

**No. 23-16091**

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**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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HOWARD JARVIS TAXPAYERS ASSOCIATION, et al.,

*Plaintiffs-Appellants,*

v.

CITY OF SAN JOSE, et al.

*Defendant-Appellee.*

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On Appeal from the United States District Court, Northern District of California  
Consolidated Case Nos. 5:22-cv-00501-BLF and 5:22-cv-02365-BLF  
(Hon. Beth Labson Freeman)

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**APPELLEE’S SUPPLEMENTAL EXCERPTS OF RECORD  
VOLUME 1 OF 2**

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10 **UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN JOSE DIVISION**

13 **NATIONAL ASSOCIATION FOR GUN**  
**RIGHTS, INC.**, a non-profit corporation, and  
14 **MARK SIKES**, an individual,

15 Plaintiffs,

16 v.

17 **CITY OF SAN JOSE**, a public entity,  
**JENNIFER MAGUIRE**, in her official capacity  
18 as City Manager of the City of San Jose, and the  
**CITY OF SAN JOSE CITY COUNCIL**,

19 Defendants.

20 **HOWARD JARVIS TAXPAYERS**  
**ASSOCIATION**; Silicon Valley Taxpayers  
21 Association; Silicon Valley Public Accountability  
22 Foundation; James Barry; and George Arrington,

23 Plaintiffs,

24 v.

25 **CITY OF SAN JOSE**, and all persons interested  
in the matter of San Jose Ordinance No. 30716,  
26 establishing an Annual Gun Harm Reduction Fee,

27 Defendants.  
28

Case No. 5:22-cv-00501-BLF

**DEFENDANTS' STATUS REPORT ON  
IMPLEMENTATION OF THE GUN HARM  
REDUCTION ORDINANCE**

Defendants' Status Report on Implementation of the Gun Harm Reduction Ordinance  
Case No. 5:22-cv-00501-BLF

Defendants City of San Jose, City Manager Jennifer Maguire, and the City of San Jose City Council (collectively, the “City”) provide the following Status Report to the Court and the parties concerning the City’s ongoing efforts to implement the San Jose Gun Harm Reduction Ordinance (“Ordinance”) at issue in these cases.

Since the Ordinance was approved by the City Council on February 8, 2022, the City has been working diligently to develop regulations and administrative procedures, and take other actions necessary to ensure the Ordinance, when fully implemented, will have the administrative infrastructure it needs to function effectively.

In its August Status Report, the City informed the Court that it had not set a date for when enforcement of the Gun Harm Reduction Fee (“Fee”) requirement will begin and that the liability insurance mandate required finalization. *NAGR* Action, ECF 78, at 1. The City referred the Court to the *Memorandum from Sarah Zárate to San Jose Mayor and City Council Re: Gun Harm Reduction Ordinance Update* (July 1, 2022), available at <https://www.sanjoseca.gov/home/showpublisheddocument/87508> (“July Memorandum”). *Id.* The July Memorandum contains a table titled “Implementation Timeline,” which lists the tasks the City needs to complete to implement the Ordinance, notes which tasks have already been completed, and provides estimated completion dates for those yet to be accomplished. July Memorandum at 3-5.

The July Memorandum continues to provide an accurate list of the anticipated work the City will, or has, undertaken to implement the Ordinance. Since the August Status Report, the City has achieved certain milestones necessary to implement the Ordinance as detailed below.

**I. Revised City Manager’s Office Regulations and Insurance Attestation Form**

The City Manager’s Office (“CMO”) published revised regulations necessary to implement the Ordinance on October 21, 2022 (“Revised Regulations”). The Revised Regulations, (consistent with the July Memorandum) set January 1, 2023 as the implementation date for the Ordinance’s insurance requirement, establish the insurance attestation form, define the criteria for a hardship exemption, and describe the peace officer and concealed weapon license exemptions. *See City Manager Regulations for the Gun Harm Reduction Ordinance* (October 21, 2022), available at <https://www.sanjoseca.gov/home/showpublisheddocument/90815>.

1 City staff will begin a public outreach campaign to inform resident gun owners of the January 1,  
2 2023 implementation date for the insurance requirement and provide instructions on how to comply  
3 with the insurance requirement through the attestation form. The insurance attestation form has been  
4 translated to Spanish and Vietnamese. Public outreach materials will also be available in these  
5 languages.

6 **II. The City's Other Progress in Implementing the Ordinance's Terms**

7 The City has engaged in other related efforts to progress towards full implementation of the  
8 Ordinance's terms.

9 **A. RFI Process**

10 First, the City has begun outreach efforts to ultimately secure a contract with a non-profit  
11 organization who will administer the programs funded by the Fee. Ordinance §§ 10.32.215, 10.32.220.  
12 To that end, the City recently issued a Request for Information ("RFI") as part of its outreach effort to  
13 any non-profit organization potentially interested in contracting with the City to provide programs and  
14 initiatives consistent with the Ordinance's terms. *Id.* The City posted its RFI on a website entitled  
15 "Biddingo.com," a governmental contract portal the City uses to solicit interest from a variety of  
16 vendors and organizations that it contracts with. The RFI was posted on October 11, 2022 and 3,131  
17 entities have since been directly notified of the City's RFI. These agencies were selected for the  
18 services they provide. The RFI will close on November 1, 2022. Numerous City websites also contain  
19 information for entities to express interest in this contract. The City's Finance Department webpage, for  
20 example, also posts detailed information about Biddingo.com, and directs the public to the City's  
21 current procurement opportunities. *See City of San Jose Finance Department: Bid Opportunities*,  
22 <https://www.sanjoseca.gov/your-government/departments/finance/purchasing/bid-opportunities> (last  
23 visited Oct. 25, 2022).

24 **B. Administrative Citation Schedule of Fines**

25 Second, the Ordinance provides that failure to comply with its terms could result in an  
26 administrative citation. Ordinance § 10.32.240. During the public meeting held on October 18, 2022,  
27 the City amended its Administrative Citation Schedule of Fines, which lists all fines the City cites for  
28 violations of any City law, to list fines for violations of the Ordinance. Escalating fine amounts were

set for first, second, and third or subsequent violations of the Ordinance (\$250, \$500, and \$1000 respectively), which are proportional to the violation type and severity with amounts set for other municipal code violations. *See Memorandum from Sarah Zárate to San Jose Mayor and City Council Re: Amendment to the Administrative Citation Schedule of Fines Resolution* (October 5, 2022), available at <https://sanjose.legistar.com/View.ashx?M=F&ID=11295898&GUID=C73A3D41-72E6-4F64-8DE2-650873A3C04E>. The fines are also included in the City Manager's Regulations for the Ordinance, which can be found on the City of San Jose Police Department's website under Documents & Policies: Gun Harm Reduction Ordinance. *See San Jose Police Department: Gun Harm Reduction Ordinance* (October 20, 2022), available at <https://www.sjpd.org/records/documents-policies/gun-harm-reduction-ordinance>.

**C. Implementation of the Gun Harm Reduction Fee**

Third, the Revised Regulations do not establish a date upon which gunowners must comply with the Fee requirement. Resident gun owners are not required to pay the Fee until a payment implementation date is set through future amended regulations.

The City will provide additional updates to the Court as appropriate of any further material developments in the City's ongoing effort to implement the Ordinance.

Dated: October 25, 2022

Respectfully submitted,

**COTCHETT, PITRE & McCARTHY, LLP**

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

NATIONAL ASSOCIATION FOR GUN  
RIGHTS, INC., et al.,

Plaintiffs,

v.

CITY OF SAN JOSE, et al.,

Defendants.

Case No. 22-cv-00501-BLF

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTIONS TO DISMISS**

[Re: ECF No. 36]

HOWARD JARVIS TAXPAYERS  
ASSOCIATION, et al.,

Plaintiffs,

v.

CITY OF SAN JOSE,

Defendant.

Case No. 22-cv-02365-BLF

[Re: ECF No. 9]

On February 8, 2022, the City of San Jose City Council voted to approve the Reduction of Gun Harm – Liability Insurance Requirement and Gun Harm Reduction Fee (the “Ordinance”), requiring San Jose gun owners to maintain gun liability insurance and pay a mandatory annual fee to a designated gun harm reduction nonprofit. This ordinance has been challenged by two sets of plaintiffs, one led by the National Association for Gun Rights, Inc. (“NAGR Plaintiffs”) and the other by the Howard Jarvis Taxpayers Association (“HJTA Plaintiffs”).

The Court previously denied NAGR Plaintiffs’ motion for preliminary injunction (“August 3 Order”). Now before the Court are Defendants’ motions to dismiss both Plaintiffs’ respective complaints. For the following reasons, the Court GRANTS IN PART and DENIES IN PART Defendants’ motions.

**I. BACKGROUND****A. The Ordinance**

The San Jose Ordinance at issue here is comprised of two primary obligations: the requirement for gunowners to maintain liability insurance (the “Insurance Requirement”) and the payment of an annual fee to a nonprofit of the City’s designation (the “Fee Provision”).

The Insurance Requirement obligates San Jose residents who own or possess a firearm to obtain a homeowner’s, renter’s, or gun liability insurance policy “covering losses or damages resulting from any accidental use of the Firearm.” First Am. Compl. Injunctive Relief, Declaratory Judgment, and Nominal Damages (“NAGR FAC”), Ex. K (“Ordinance”) § 10.32.210 (the “Insurance Requirement”), NAGR ECF No. 19.<sup>1</sup>

The Fee Provision requires San Jose gun owners to pay an Annual Gun Harm Reduction Fee (the “Fee”) to a Designated Nonprofit Organization (the “Nonprofit”), selected by the City Manager. *Id.* § 10.32.215, 10.32.235. The Fee amount will be established by City Council, and every dollar generated must be used by the Nonprofit to provide “services to residents of the City that own or possess a [f]irearm in the City, to members of their household, or to those with whom they have a close familial or intimate relationship.” *Id.* § 10.32.220(A). The Ordinance instructs the Nonprofit to spend the funds generated from the Fee exclusively for programs and initiatives designed to “(a) reduce the risk or likelihood of harm from the use of firearms in the City of San Jose, and (b) mitigate the risk of physical harm or financial, civil, or criminal liability that a San Jose firearm owner or her family will incur through her possession of firearms.” *Id.* § 10.32.220(C). Proceeds generated by the Fee may not be used for litigation, political advocacy, or lobbying activities nor may the City “specifically direct how the monies from the Gun Harm Reduction Fee are expended.” *Id.* §§ 10.32.220(B) – (C).

In addition to obtaining gun liability insurance and paying the annual Fee, San Jose

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<sup>1</sup> ECF entries in the NAGR Plaintiffs’ docket, *i.e.*, Case No. 22-cv-00501-BLF, will be referred to as “NAGR ECF No.” Likewise, ECF entries in the HJTA Plaintiffs’ docket will be referred to as “HJTA ECF No.”

1 residents must also maintain City-designated proof of compliance. *Id.* § 10.32.230. The  
 2 Ordinance sets out a limited number of exemptions from its obligations, including a “financial  
 3 hardship” exemption, the criteria for which will be promulgated by the City Manager. *Id.* §§  
 4 10.32.225, 10.32.235(A)(4).

5 Violations of the Ordinance are punishable by administrative citation with fines to be  
 6 established by City Council. *Id.* § 10.32.240. Although the Ordinance would permit the  
 7 impoundment of any non-compliant person’s firearm to the extent allowed by law (*id.* §  
 8 10.32.245), the City admitted in its briefing that the section is inoperable because “[t]here is  
 9 currently no lawful basis to impound firearms under state or federal law.” Mot. Dismiss [NAGR]  
 10 Pls.’ First Am. Compl. (“Mot. NAGR”), at 5-6, NAGR ECF No. 36; *see also* Mot. Dismiss  
 11 [HJTA] Pls.’ Compl. (“Mot. HJTA”), at 6, HJTA ECF No. 9.

12 The Ordinance authorizes the City Manager to promulgate certain implementing  
 13 regulations, including the designation of the Nonprofit, additional guidelines on and audits of the  
 14 use of the Fee, and establishing the criteria for the “financial hardship” exemption. *Id.* §  
 15 10.32.235. At the time the NAGR and HJTA complaints were filed and as of the date of this  
 16 Order, the City Council and City Manager have not yet established the amount of the Fee, the  
 17 amount of any administrative fines, or the identity of the Nonprofit. Mot. NAGR 8-9; *see also*  
 18 Defs.’ Corrected Status Report 1-2, NAGR ECF No. 78, Aug. 17, 2022 (“[T]he City has not yet  
 19 set a date for when enforcement of the Fee requirements will begin, nor has it designated the  
 20 nonprofit organization to which the Fee must be paid.”).

## 21 **B. Procedural History**

### 22 **i. National Association for Gun Rights, Inc. (“NAGR”), et al.**

23 Plaintiff National Association for Gun Rights, Inc. (“NAGR”) describes itself as a  
 24 nonprofit grassroots organization dedicated to defending the Second Amendment right to keep and  
 25 bear arms. NAGR FAC ¶ 13. Its members include San Jose residents, such as Plaintiff Mark  
 26 Sikes, who legally own guns and would be subject to the Ordinance if it were to go into effect. *Id.*  
 27 ¶ 14. NAGR Plaintiffs name the City of San Jose, Jennifer Maguire in her official capacity as City  
 28 Manager, and the City of San Jose City Council (collectively, the “City”) as defendants to their



1 suit. *Id.* ¶¶ 15-17.

2 NAGR Plaintiffs filed their original complaint on January 25, 2022, the same day the City  
3 passed the first reading of the Ordinance. *See* NAGR ECF No. 1. They challenge both the  
4 Insurance Requirement and the Fee Provision in five claims for violations of the First and Second  
5 Amendment to the U.S. Constitution, the California Constitution, and the City of San Jose’s City  
6 Charter, as well as a sixth claim under the Declaratory Judgment Act. NAGR FAC ¶¶ 82-148.

7 On March 8, 2022, NAGR Plaintiffs moved for a preliminary injunction against the  
8 enforcement of the Ordinance, which both parties fully briefed by March 29, 2022. NAGR ECF  
9 Nos. 25, 28, 32. Shortly thereafter, the City filed the instant motion to dismiss NAGR Plaintiffs’  
10 First Amended Complaint on April 8, 2022, which was fully briefed by April 29, 2022. NAGR  
11 ECF Nos. 36, 46, 50.

12 On June 23, 2022 (after both motions were briefed but before hearing on either), the  
13 United States Supreme Court issued its opinion in *New York State Rifle & Pistol Ass’n., Inc. v.*  
14 *Bruen*, 142 S. Ct. 2111 (2022), expressly rejecting the “two-step” means-end scrutiny framework that  
15 Circuit Courts of Appeals and the parties had used to analyze Second Amendment challenges. After  
16 requesting and receiving the parties’ supplemental briefings on the application of *Bruen* (NAGR ECF  
17 Nos. 64-65) and hearing oral arguments, the Court denied NAGR Plaintiffs’ motion for preliminary  
18 injunction on August 3, 2022. NAGR ECF No. 72.

19 **ii. Howard Jarvis Taxpayers Association (“HJTA”), et al.**

20 Plaintiff Howard Jarvis Taxpayers Association (“HJTA”) is a nonprofit public benefit  
21 corporation that engages in civil litigation to ensure constitutional taxation in California. Notice  
22 of Removal, Ex. A (“HJTA Compl.”), HJTA ECF No. 1. Plaintiffs Silicon Valley Taxpayers  
23 Association, Inc. (“SVTA”) and Silicon Valley Public Accountability Foundation (“SVPAF”) are  
24 also nonprofit public benefit corporations comprised of Santa Clara County residents, seeking to  
25 reduce taxes and monitor Santa Clara County public officials, respectively. *Id.* ¶¶ 2-3. All three  
26 associations’ members include San Jose gun owners who would be subject to the Fee Provision.  
27 *Id.* ¶¶ 1-3. In addition to the associational plaintiffs, the suit is also brought by individual  
28 plaintiffs, James Barry and George Arrington (collectively with HJTA, SVTA, and SVPAF, the

1 “HJTA Plaintiffs”), both of whom are San Jose residents who legally own firearms. *Id.* ¶¶ 4-5.

2 On March 7, 2022, the HJTA Plaintiffs filed their “Complaint to Invalidate §§ 10.32.215  
3 and 10.32.230(B) of Chapter 10.32 of the Title 10 of the San Jose Municipal Code” in the Santa  
4 Clara County Superior Court. Notice of Removal ¶ 1, HJTA ECF No. 1. The HJTA Complaint is  
5 styled as a validation action pursuant to Cal. Civ. Proc. Code §§ 860, *et seq.*, and asserts four  
6 causes of action: (1) violation of constitutional rights of speech and association under both the  
7 U.S. and California Constitution; (2) “unconstitutional condition” of the Second Amendment and  
8 California Constitution; (3) “special tax lacking voter approval” under the California Constitution,  
9 and (4) “unconstitutional delegation of power to tax” under the California Constitution. HJTA  
10 Compl. ¶¶ 8-37. Notably, HJTA Plaintiffs only challenge the Fee Provision and not the Insurance  
11 Requirement. *See* Opp. Pls. Mot. Dismiss Compl. (“HJTA Opp.”) 13, HJTA ECF No. 16.

12 On April 15, 2022, the City removed the HJTA Complaint to the Northern District of  
13 California based on the First and Second Amendment claims. Notice of Removal ¶¶ 4-6. Shortly  
14 thereafter, the Court granted the City’s motion to relate the HJTA Plaintiffs’ case with the NAGR  
15 Plaintiffs’ case. NAGR ECF No. 41; HJTA ECF No. 5. On September 30, 2022, the Court  
16 consolidated both cases for all purposes. NAGR ECF No. 80.

17 On April 22, 2022, the City moved to dismiss the HJTA Complaint on Rule 12(b)(1) and  
18 (b)(6) grounds. Mot. HJTA 1. The City and HJTA Plaintiffs completed their briefing by May 13,  
19 2022, and the Court heard oral arguments on August 18, 2022.

## 20 **II. LEGAL STANDARD**

### 21 **A. Lack of Subject Matter Jurisdiction**

22 A party may challenge the Court’s subject matter jurisdiction by bringing a motion to  
23 dismiss under Federal Rule of Civil Procedure 12(b)(1). “A Rule 12(b)(1) jurisdictional attack  
24 may be facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).  
25 In a facial attack, the movant asserts that the lack of subject matter jurisdiction is apparent from  
26 the face of the complaint. *Id.* In a factual attack, the movant disputes the truth of allegations that  
27 otherwise would give rise to federal jurisdiction. *Id.* “In resolving a factual attack on jurisdiction,  
28 the district court may review evidence beyond the complaint without converting the motion to

1 dismiss into a motion for summary judgment.” *Id.* “The court need not presume the truthfulness  
2 of the plaintiff’s allegations.” *Id.* If the moving party presents evidence demonstrating the lack of  
3 subject matter jurisdiction, the party opposing the motion must present affidavits or other evidence  
4 sufficient to establish subject matter jurisdiction. *Id.*

5 **B. Failure to State a Claim**

6 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a  
7 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*  
8 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d  
9 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts  
10 as true all well-pled factual allegations and construes them in the light most favorable to the  
11 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). While a  
12 complaint need not contain detailed factual allegations, it “must contain sufficient factual matter,  
13 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556  
14 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is  
15 facially plausible when it “allows the court to draw the reasonable inference that the defendant is  
16 liable for the misconduct alleged.” *Id.* On a motion to dismiss, the Court’s review is limited to  
17 the face of the complaint and matters judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803  
18 F.2d 500, 504 (9th Cir. 1986).

19 In deciding whether to grant leave to amend, the Court must consider the factors set forth  
20 by the Supreme Court in *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962), and discussed at  
21 length by the Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir.  
22 2003). A district court ordinarily must grant leave to amend unless one or more of the *Foman*  
23 factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure  
24 deficiencies by amendment, (4) undue prejudice to the opposing party, or (5) futility of  
25 amendment. *Eminence Capital*, 316 F.3d at 1052. “[I]t is the consideration of prejudice to the  
26 opposing party that carries the greatest weight.” *Id.* However, a strong showing with respect to  
27 one of the other factors may warrant denial of leave to amend. *Id.*

**III. DISCUSSION**

Although the NAGR and HJTA Complaints contain overlapping claims, there are several differences in the approach each set of Plaintiffs has elected to challenge the City's Ordinance, as well as in the City's respective motions to dismiss. Accordingly, the Court will address each complaint separately.

**A. NAGR FAC**

The City moves to dismiss each of the NAGR FAC's claims for failure to state a claim. Mot. NAGR 10-23. Additionally, the City argues that the NAGR FAC is unripe and fails to state a proper facial constitutional challenge, though these arguments appear only to apply to NAGR Plaintiffs' Fee Provision challenges. *Id.* at 7-10. For the following reasons, the Court will GRANT IN PART and DENY IN PART the City's motion as to the NAGR FAC.

**i. First Amendment**

The NAGR FAC's First Amendment claim is only asserted against the Ordinance's Fee Provision and alleges that the City "may not require Plaintiffs to pay fees to nonprofits when those fees are going to be used to fund activities of ideological or political nature, such as endorsing gun control." NAGR FAC ¶ 112. The City moves to dismiss this claim on three grounds: it is unripe, it fails to state a proper facial challenge, and it fails to state a claim under Rule 12(b)(6). Mot. NAGR 7-9, 16-17. Because "jurisdiction generally must precede merits in dispositional order," the Court first addresses the City's ripeness challenges. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999).

In the August 3 Order, the Court found that NAGR Plaintiffs' First Amendment challenge to the Fee Provision was unripe because the Court had no information as to what activities—and more critically what speech or expression, if any—the proceeds from the Fee would fund. *See* Aug. 3 Order 9-11. Today, the Court finds that this reasoning applies equally to NAGR Plaintiffs' First Amendment claim, now reviewed on a motion to dismiss. Because the City Manager has not promulgated regulations identifying the Nonprofit's activities, the Court cannot determine if the Fee would fund any expressive activities and thereby remains unfit for judicial determination. Additionally, NAGR Plaintiffs still have not highlighted any hardship they would suffer from the

1 Court withholding consideration at this time. *Id.*; *see also Bishop Paiute Tribe v. Inyo Cnty.*, 863  
2 F.3d 1144, 1154 (9th Cir. 2017).

3 Neither the NAGR FAC nor NAGR Plaintiffs' opposition contains any allegations that  
4 would reassure the Court of the First Amendment claim's ripeness. For example, the FAC alleges  
5 that the City "may not require Plaintiffs to pay fees to nonprofits when those fees are going to be  
6 used to fund activities of ideological or political nature" (NAGR FAC ¶ 112) but does not allege  
7 that the Nonprofit would be engaging in ideological or political activities. The NAGR FAC  
8 provides only speculation on what the Nonprofit's activities are *likely* to be. *See id.* ¶ 62 ("The  
9 one thing that is clear is that the organization will *likely* be dedicated to exclusively preaching the  
10 negative risks of gun ownership. . . .") (emphasis added). Plaintiffs' inability to specify these facts  
11 is not surprising, as the Ordinance itself only sets broad directives for the Nonprofit (*e.g.*, "reduce  
12 the risk or likelihood of harm from the use of firearms") and a non-exhaustive and non-mandatory  
13 list of potential activities. Ordinance § 10.32.220.

14 To the extent NAGR Plaintiffs argue that—regardless of the Nonprofit's actual activities—  
15 the Supreme Court's decision in *Janus* instructs that a mandatory Fee to *any* nonprofit would  
16 violate the First Amendment, this argument is unavailing. *See* Hearing Tr. 18:20-24, Aug. 4,  
17 2022, NAGR ECF No. 76 ("NAGR Hearing Tr.") (citing *Janus v. Am. Fed'n of State, Cnty., &*  
18 *Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018)). In *Janus*, the recipient of the compulsory fees  
19 (*i.e.*, the union) and the activities the fees would fund were known and well-defined for First  
20 Amendment scrutiny. *See* 138 S. Ct. at 2461 (noting that nonmembers' agency fees paid for the  
21 "cost of collective bargaining," as well as lobbying, social and recreational activities, advertising,  
22 membership meetings and conventions, and litigation). Here, by contrast, there are no such  
23 concrete activities that the Court can consider in applying any level of First Amendment scrutiny  
24 or the Supreme Court's reasoning in *Janus*.

25 For the reasons set forth above, the City's motion to dismiss the First Amendment claim  
26 for lack of ripeness is GRANTED. "In the Ninth Circuit, it is proper to liberally allow amendment  
27 of a complaint to cure jurisdictional defects." *Nat. Res. Def. Couns. v. Winter*, 2008 WL  
28 11338646, at \*3 (C.D. Cal. Apr. 10, 2008) (internal quotation marks omitted). Accordingly, the

1 Court will DISMISS the NAGR FAC's First Amendment claim with LEAVE TO AMEND.

2 **ii. Second Amendment**

3 The NAGR FAC asserts Second Amendment violations against both the Ordinance's Fee  
4 Provision and the Insurance Requirement (NAGR FAC ¶ 88), pled under the pre-*Bruen* "two-step"  
5 framework of Second Amendment analysis. *See id.* ¶¶ 88-102.

6 The City moves to dismiss NAGR Plaintiffs' Second Amendment claim on ripeness  
7 grounds with respect to the Fee Provision (Mot. NAGR 8-10) and on Rule 12(b)(6) grounds under  
8 the former "two-step" framework for the Insurance Requirement. Mot. NAGR 10-16. NAGR  
9 Plaintiffs' Opposition similarly presents now legally incognizable arguments, such as the proper  
10 level of scrutiny and the Ordinance's "reasonable fit," as does the City's Reply. *See* NAGR Pls.'  
11 Resp. ("NAGR Opp.") 12-16, NAGR ECF No. 46; Defs.' Reply ("Reply NAGR") 5-8. The Court  
12 has not requested—and the parties have not provided—supplemental briefs to update this motion's  
13 Second Amendment briefing in accordance with *Bruen*, though the Court did request such briefs  
14 on a different procedural posture. *See* NAGR ECF Nos. 64-65.

15 The Court previously held that NAGR Plaintiffs' Second Amendment challenge to the Fee  
16 Provision was not ripe because the City Council had not yet confirmed the Fee's final amount nor  
17 had the City Manager promulgated the "financial hardship" criteria by which a gun owner may be  
18 exempt from paying the Fee. Aug. 3 Order 11-13. Once again, the Court sees no reason to depart  
19 from its prior ripeness reasoning, especially given that the NAGR FAC itself alleges the  
20 uncertainty of the Ordinance's financial burden. *See* NAGR FAC ¶ 90 ("The City's fees, too, are  
21 left unstated and deferred to future, unscheduled determinations of the City Council."). As with  
22 their First Amendment claim, NAGR Plaintiffs also have not demonstrated any hardship of  
23 withholding judicial consideration on their Second Amendment claim, such as serious penalties  
24 requiring them to make immediate and significant changes to their regular conduct. *See Wolfson*  
25 *v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010). Accordingly, the Court will DISMISS NAGR  
26 Plaintiffs' Second Amendment claim as to the Fee Provision for lack of ripeness.

27 Regarding the Second Amendment challenges to the Insurance Requirement, the NAGR  
28 FAC's allegations—irrespective of their sufficiency under a prior framework—do not track the

1 current legal standard. As noted above, the Supreme Court expressly rejected the previous two-  
 2 step framework that the Circuit Courts of Appeals—and the parties—had used to evaluate Second  
 3 Amendment constitutional challenges. *See Bruen*, 142 S. Ct. at 2126-30. The present standard as  
 4 pronounced in *Bruen* is, as follows: “When the Second Amendment’s plain text covers an  
 5 individual’s conduct, the Constitution presumptively protects that conduct. The government must  
 6 then justify its regulation by demonstrating that it is consistent with the Nation’s historical  
 7 tradition of firearm regulation.” *Id.* at 2129-30. As currently drafted, the NAGR FAC does not  
 8 provide the necessary allegations to support a Second Amendment claim under this new standard.  
 9 For instance, the NAGR FAC does not define a proposed course of conduct for the Court to  
 10 determine whether it is covered by the Second Amendment’s plain text. *See Bruen*, 145 S. Ct at  
 11 2134-36. The only post-*Bruen* arguments the Court received were presented under a different  
 12 procedural posture and did not directly address the sufficiency of the NAGR FAC.<sup>2</sup> *See* NAGR  
 13 ECF Nos. 64-65.

14 Under these circumstances, the Court finds that the NAGR FAC—drafted under a now  
 15 obsolete Second Amendment landscape—does not state a claim under the current post-*Bruen*  
 16 framework. The NAGR FAC’s Second Amendment challenge to the Insurance Requirement will  
 17 be DISMISSED with LEAVE TO AMEND its allegations consistent with the Supreme Court’s  
 18 decision in *Bruen*.

### 19 **iii. State Preemption**

20 The NAGR FAC’s Third Claim asserts that the Ordinance’s requirements are preempted  
 21 by California law, primarily as interpreted by *Fiscal v. City & Cnty. of San Francisco*, 158 Cal.  
 22 App. 4th 895, 909 (2008) (“[I]t can be readily infer[red] . . . that the Legislature intended to  
 23 \_\_\_\_\_

24 <sup>2</sup> In its August 3 Order, the Court inferred a proposed course of conduct from the parties’ post-  
 25 *Bruen* supplemental briefing for the limited purpose of evaluating NAGR Plaintiffs’ likelihood of  
 26 success. Aug. 3 Order 14-16. The Court, however, is unable to do so here on a Rule 12(b)(6)  
 27 motion to dismiss where the operative pleading makes no reference to the plaintiffs’ proposed  
 28 conduct and provides no basis for such inference.



1 occupy the field of residential handgun possession to the exclusion of local governmental  
2 entities.”) (internal quotation marks omitted). *See* NAGR FAC ¶¶ 117-119.

3 The NAGR FAC correctly states that the City of San Jose may “make and enforce within  
4 its limits all . . . ordinances and regulations not in conflict with general laws.” *Id.* ¶ 117 (quoting  
5 Cal. Const. art. XI, § 7). A local ordinance conflicts with general laws if it “duplicates,  
6 contradicts, or enters an area fully occupied by general law, either expressly or by legislative  
7 implication.” *O’Connell v. City of Stockton*, 41 Cal. 4th 1061, 1067 (2007) (emphasis added).  
8 Here, the NAGR FAC asserts that the Ordinance is entering a field fully occupied by the state  
9 Legislature, specifically the “field of regulating residential handgun possession.” NAGR FAC ¶¶  
10 118-19. The City responds, in part, that the Ordinance does not implicate handgun *possession*, nor  
11 does it encroach upon any of the discrete areas of firearm regulation that the California Legislature  
12 has preempted (*e.g.*, permitting, licensing, and registration). Reply NAGR 4-5.

13 The Court begins with the observation that the California Legislature has “chosen not to  
14 broadly preempt local control of firearms but has targeted certain specific areas for preemption.”  
15 *Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal. 4th 853, 864 (2002). This observation is  
16 reinforced by *Fiscal*—NAGR Plaintiffs’ central case authority—which acknowledges that “state  
17 law tends to concentrate on specific areas, leaving unregulated other substantial areas relating to  
18 the control of firearms . . . to permit local governments to tailor firearms legislation to the  
19 particular needs of their communities.” 158 Cal. App. 4th at 905. The Court, therefore, is mindful  
20 that the relevant “fields” the California Legislature has occupied on firearm regulation are discrete  
21 and specific, rather than broad or sweeping.<sup>3</sup>

22 In their opposition, NAGR Plaintiffs primarily argue that the California Legislature has  
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24 <sup>3</sup> The NAGR FAC alleges that “local governments are excluded from *further regulation of guns*,”  
25 though NAGR Plaintiffs appear to have pulled back somewhat from this position. NAGR FAC ¶  
26 119 (emphasis added). In any event, this assertion is plainly at odds with the findings in *Great W.*  
27 *Shows* and *Fiscal* that “the Legislature has never expressed an intent to preempt the entire field of  
28 firearm regulation to the exclusion of local control.” *Fiscal*, 158 Cal. App. 4th at 905.



1 preempted the field of “residential handgun possession.” NAGR Opp. 11 (citing *Fiscal*, 158 Cal.  
 2 App. 4th at 908). Their emphasis on *Fiscal* and the scope of “residential handgun possession,”  
 3 however, is ultimately misplaced because the Ordinance does not confer any authority to  
 4 dispossess a San Jose resident of his or her firearm. The City has acknowledged that “[t]here is  
 5 currently no lawful basis to impound firearms under state or federal law” and, therefore, violations  
 6 of the Ordinance are only punishable by an administrative citation and fine.<sup>4</sup> Mot. NAGR, at 5-6;  
 7 *see also* Ordinance §§ 10.32.240; 10.32.245. To the extent NAGR Plaintiffs argue that  
 8 “residential handgun possession” should be broadly interpreted to preclude any local regulation  
 9 that would merely *affect* handgun owners as a group—*i.e.*, by virtue of the sole fact that they  
 10 possess a firearm—such an interpretation is not supported by *Fiscal*. *See* 158 Cal. App. 4th at 905  
 11 (“[T]he Legislature has never expressed an intent to preempt the entire field of firearm regulation  
 12 to the exclusion of local control.”); *see also id.* at 919 (“[C]ourts have tolerated subtle local  
 13 encroachment into the field of firearms regulation”). Without any means by which handgun  
 14 possession can be revoked, the Ordinance cannot be interpreted to be entering the field of  
 15 residential handgun *possession*, as alleged in NAGR FAC ¶ 119.

16 In addition to their reliance on *Fiscal*, NAGR Plaintiffs also argue that the Insurance  
 17 Requirement and Fee Provision are akin to a permitting or licensing scheme, which is expressly  
 18 precluded by Penal Code § 25605. NAGR Opp. 11; *see also* Cal. Gov. Code § 53071 (“It is the  
 19 intention of the Legislature to occupy the whole field of regulation of the registration or licensing  
 20 of commercially manufactured firearms. . . .”). This analogy is unpersuasive. First, the Ordinance  
 21 expressly exempts “persons who have a license to carry a concealed weapon issued pursuant to  
 22 California Penal Code § 26150 or § 26155,” Ordinance § 10.32.225(B), evidencing the City’s  
 23 intent to avoid encroaching upon the preempted field of licensing or permitting. Second, unlike  
 24

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25 <sup>4</sup> By contrast, the ordinance that gave rise to the holding in *Fiscal* purported to “ban[] the  
 26 *possession* of handguns by San Francisco residents,” 158 Cal. App. 4th at 906 (emphasis in  
 27 original), and was titled “Limiting Handgun *Possession* in the City and County of San Francisco.”  
 28 *Id.* (emphasis added).

1 permitting or licensing regimes, compliance with the Ordinance does not signify that gun owners  
 2 must obtain the City's permission or authorization to possess firearms in the first instance; and  
 3 unlike registration programs, the Ordinance does not entail formalized and specific recordkeeping  
 4 by the City. *See Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal. 4th 853, 861 (2002) (noting  
 5 that "licensing" is understood to signify "permission or authorization" and "registration" to mean  
 6 "recording formally and exactly") (internal quotation marks omitted). Accordingly, the  
 7 Ordinance's compliance requirement is dissimilar to a gun licensing or registration scheme and,  
 8 therefore, is not preempted by California general laws on firearm licensing or registration.

9 Although leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P.  
 10 15(a), dismissal without leave may be proper "if the amendment would be futile." *California ex*  
 11 *rel. California Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 673 (9th  
 12 Cir. 2004). Here, the question of whether the Ordinance's requirements are preempted by  
 13 California state law is a pure question of law. As a result, there are no factual amendments that  
 14 could salvage NAGR Plaintiffs' state preemption claim. *See, e.g., N.L.R.B. v. Vista Del Sol*  
 15 *Health Servs., Inc.*, 40 F. Supp. 3d 1238, 1255 (C.D. Cal. 2014) ("Because the question of its  
 16 jurisdiction to hear the case is a pure question of law, the court concludes that allowing  
 17 [declaratory relief plaintiff] to amend its complaint would be futile, it therefore dismisses the  
 18 action with prejudice."). The Court will therefore DISMISS NAGR Plaintiffs' Third Claim for  
 19 Relief WITHOUT LEAVE TO AMEND.

#### 20 **iv. State Tax Requirements**

21 The NAGR FAC's Fourth Claim for Relief asserts violations of article XIII C of the  
 22 California Constitution, specifically that the Insurance Requirement and Fee Provision constitute  
 23 taxes that have not been submitted to the electorate for a vote. NAGR FAC ¶¶ 123-131.

24 The City moves to dismiss this claim on two grounds. First, neither the insurance  
 25 premiums nor the Fee proceeds will be payable to the City and, therefore, they are not taxes; and  
 26 second, in any event, both the insurance and the Fee would fall under the "specific benefit"  
 27 exception in the California Constitution. Mot. NAGR 19-20. With respect to the first point, the  
 28 City relies on *Schmeer v. Cnty. of Los Angeles*, 213 Cal. App. 4th 1310, 1328-29 (2013), as

1 modified (Mar. 11, 2013), in which the California Court of Appeal held that the language in article  
2 XIII C is “limited to charges payable to, or for the benefit of, a local government.”

3 In the absence of contrary California authority or the California Supreme Court’s  
4 interpretation of article XIII C, the Court finds persuasive the thorough analysis conducted in  
5 *Schmeer*. There, the Court of Appeal had considered the historical foundations behind the voter  
6 initiative that gave rise to article XIII C, including two prior initiatives adopted in 1978 and 1992,  
7 as well as a 1997 decision from the California Supreme Court. *See Schmeer*, 213 Cal. App. 4th at  
8 1326-23; *see also id.* at 1323-30 (analyzing the voters’ interpretation of the ballot initiative and the  
9 definition of a “tax”). Although NAGR Plaintiffs attempt to distinguish *Schmeer* on its facts, the  
10 Court notes that *Schmeer*’s reasoning and interpretation of article XIII C does not rely or turn on  
11 the specific ordinance in that case, which was a paper carryout bag charge. *See id.* at 1326-30.

12 With *Schmeer* as the touchstone for its article XIII C analysis, the Court finds that NAGR  
13 Plaintiffs have all but pled their Fourth Claim out of court. The NAGR FAC expressly alleges that  
14 “the insurance is allocated to for-profit corporations and the fee is allocated to an unnamed  
15 nonprofit rather than the City.” NAGR FAC ¶ 130 (emphasis added). To use the specific  
16 language from *Schmeer*, NAGR Plaintiffs have alleged that the Insurance Requirement and Fee  
17 are not “payable to, or for the benefit of, a local government.” 213 Cal. App. 4th at 1328-29.  
18 With this allegation in the NAGR FAC, NAGR Plaintiffs are unable to state an article XIII C  
19 taxing claim against the Ordinance’s Insurance Requirement and Fee Provision, and their Fourth  
20 Claim is thereby subject to dismissal under Rule 12(b)(6).

21 The Court, however, will grant NAGR Plaintiffs leave to amend this claim, as amendment  
22 may not be futile. *See, e.g., Eminence Capital*, 316 F.3d at 1052. As it remarked at the hearing on  
23 the City’s motion, the Court finds merit in NAGR Plaintiffs’ argument that the City could  
24 effectively end-run the California Constitution’s voter approval requirements by simply directing  
25 residents to pay an organization that is in fact the “City in nonprofit clothing.” NAGR Hearing Tr.  
26 6:18-7:8. This risk would be heightened if the designated Nonprofit will be specially created by  
27 the City (as opposed to a currently existing nonprofit organization) or—as the City has argued  
28 elsewhere—if the Nonprofit will express government speech and policies. *See* Def. Reply 6

1 (“[T]he purpose of the Fee is not to support private speech but to fund government speech and  
2 policy as set forth in the Ordinance.”), HJTA ECF No. 17. Given these reservations, the Court  
3 cannot say that the Fee Provision and the recipient Nonprofit could never violate article XIII C of  
4 the California Constitution as interpreted by *Schmeer*. But, as currently pled, the NAGR FAC  
5 fails to state a valid claim on this point.

6 The Court will GRANT the City’s motion to dismiss the NAGR FAC’s Fourth Claim for  
7 Relief with LEAVE TO AMEND.

8 **v. San Jose City Charter**

9 The NAGR Plaintiffs’ Fifth Claim for Relief asserts violations of the San Jose City  
10 Charter. NAGR FAC ¶¶ 135-144; *see also id.*, Ex. A (“City Charter”). The NAGR FAC alleges  
11 that the Ordinance (1) violates the City Charter’s requirement that all “revenues and receipts” be  
12 placed into the City’s General Fund by directing the Fee to a third-party Nonprofit (City Charter §  
13 1211); (2) infringes upon City Council’s budgeting and appropriation powers by prohibiting the  
14 City from directing how the Fee is expended (*id.* §§ 1204-1207); and (3) infringes upon the City  
15 Manager’s executive functions for the same reason (*id.* § 701).

16 On their City Charter claim, as with their taxing claim, NAGR Plaintiffs seem to have pled  
17 themselves beyond the scope of most of their cited City Charter provisions. By alleging that the  
18 insurance premiums and Fee are allocated to other entities and not to the City (NAGR FAC ¶  
19 130), the NAGR FAC has put those proceeds beyond any reasonable definition of “revenues and  
20 receipts” for the purpose of City Charter § 1211 (“All revenues and receipts which are not required  
21 . . . to be placed in special funds shall be credited to the General Fund.”). Furthermore, because  
22 the NAGR FAC alleges that the Fee and Insurance Requirement “are not for government activity”  
23 (NAGR FAC ¶ 42), those provisions do not impact the City Council’s budget, which is a  
24 “complete financial plan of all City *funds and activities*.” City Charter § 1205 (emphasis added).  
25 The City Charter appropriations claim falls for the same reasons, as City Council’s appropriation  
26 power only pertains to “monies for the operation of each of the *offices, departments and agencies*  
27 *of the City*.” *Id.* § 1207 (emphasis added); *see also* Aug. 3 Order 28-29. Accordingly, the NAGR  
28 FAC, as drafted, does not state a violation of City Charter §§ 1204-1207, 1211.

1 That said, the Court will note its concerns regarding the ripeness of NAGR Plaintiffs'  
 2 remaining claim for violation of City Charter § 701(d), *i.e.*, that the Ordinance undermines the  
 3 City Manager's responsibility for the "faithful execution of all laws." City Charter § 701(d); *see*  
 4 *also* Aug. 3 Order 29. The Court cannot fully evaluate this claim until the City Manager develops  
 5 implementing regulations on the guidance and auditing of the Nonprofit. *See* Ordinance §  
 6 10.32.235(A)(2). And to the extent those regulations result in such governmental oversight that  
 7 the City would effectively control all but the choice of the Nonprofit's expenditures, that  
 8 possibility would dovetail with the Court's concerns that the Nonprofit may be used as a vehicle  
 9 for the City to circumvent the California Constitution's voter-tax requirements. *See supra* Section  
 10 III(A)(iv). Such developments could also affect the Court's analysis regarding whether the  
 11 Nonprofit's activities could properly be considered as City's activities for the purposes of City  
 12 Charter's budgeting and appropriations delegation to City Council. City Charter §§ 1204-1207.

13 In sum, the NAGR FAC has made affirmative allegations that would place the Ordinance's  
 14 provisions beyond the scope of most of their City Charter claims. Although those deficiencies do  
 15 not directly impact the NAGR Plaintiffs' City Charter § 701(d) claim, the Court's evaluation of  
 16 that claim may not be complete without the City Manager's to-be-determined regulations  
 17 regarding the Nonprofit. Given the interwoven nature of NAGR Plaintiffs' various City Charter  
 18 challenges, the Court will DISMISS the entirety of NAGR Plaintiffs' Fifth Claim for Relief with  
 19 LEAVE TO AMEND following the promulgation of implementing regulations.

#### 20 **vi. Declaratory Judgment Relief**

21 Finally, the NAGR FAC asserts a claim under the Declaratory Judgment Act, seeking  
 22 declaratory relief "to the extent that each of the claims above have not already established a  
 23 remedy." NAGR FAC ¶ 148. The City moved to dismiss this claim as duplicative of NAGR  
 24 Plaintiffs' other five claims and also renewed its ripeness argument with respect to this claim.  
 25 Mot. NAGR 23; Reply NAGR 14-15.

26 Addressing the City's ripeness argument first, the Court is satisfied that subject matter  
 27 jurisdiction exists over the request for declaratory relief, because at minimum there is an actual  
 28 case or controversy over NAGR Plaintiffs' Second Amendment § 1983 claim against the

1 Insurance Requirement. First, “when the threat of prosecution under a challenged statute is real, a  
 2 declaratory judgment on the constitutionality of the statute is appropriate.” 10B Charles A.  
 3 Wright, Arthur R. Miller, & Mary K. Kane, *Federal Practice and Procedure* § 2757 (4th ed.).  
 4 Here, the City has made no indication that it does not intend to enforce the Insurance Requirement  
 5 against San Jose residents, a population that includes individual Plaintiff Mark Sikes. *See*  
 6 *generally* NAGR ECF No. 78; *see also* NAGR Opp. 10. Second, the City’s ripeness arguments—  
 7 which largely target NAGR Plaintiffs’ attacks on the Fee Provision—barely address and certainly  
 8 do not establish that NAGR Plaintiffs’ Second Amendment challenges to the Insurance  
 9 Requirement are unripe. *See* Mot. NAGR 7-9; Reply NAGR 2-3. Accordingly, the Court is  
 10 satisfied that some “actual case or controversy” exists with respect to NAGR Plaintiffs’ request for  
 11 declaratory relief.

12 As to the City’s duplication argument, “[t]he existence of another adequate remedy does  
 13 not preclude a declaratory judgment that is otherwise appropriate.” Fed. R. Civ. P. 57; *see also* 28  
 14 U.S.C. § 2201(a) (providing that declaratory relief may be sought “whether or not further relief is  
 15 or could be sought”); 10B Wright, Miller, & Kane, § 2758 (“[T]he general principle is, as stated in  
 16 the rule, that the existence of another adequate remedy does not bar a declaratory judgment.”).  
 17 That said, the Court may, in the exercise of its sound discretion, deny declaratory relief where  
 18 another remedy is “more appropriate.” *Rodriguez v. Bank of Am.*, 2011 WL 5864108, at \*4 (N.D.  
 19 Cal. Nov. 22, 2011); *see also, e.g., Shin v. ICON Found.*, 2021 WL 6117508, at \*6 (N.D. Cal.  
 20 Dec. 27, 2021) (noting that “declaratory relief that is ‘needlessly duplicative’ of the damages or  
 21 relief requested under the substantive claims” may be inappropriate). Here, the NAGR Plaintiffs  
 22 have requested declaratory judgment to the extent their other claims have not already established a  
 23 remedy (NAGR FAC ¶ 148), and the Court finds at this early stage that the scope of the requested  
 24 declaratory relief is not inappropriately duplicative of NAGR Plaintiffs’ injunctive relief. *Cf.*  
 25 *Steffel v. Thompson*, 415 U.S. 452, 472 (1974) (holding that declaratory relief may be available  
 26 where injunctive relief is not, such as in the absence of irreparable injury).

27 Accordingly, the Court DENIES the City’s motion to dismiss NAGR Plaintiffs’ sixth claim  
 28 for declaratory relief.



**B. HJTA Complaint**

The City moves to dismiss all four counts of the HJTA Complaint, all of which only target the Ordinance's Fee Provision. Mot. HJTA 3. The City seeks dismissal pursuant to Rule 12(b)(1) for lack of ripeness and standing, as well as Rule 12(b)(6) for failure to state a claim. For the following reasons, the Court will GRANT the City's motion to dismiss the HJTA Complaint and permit HJTA Plaintiffs LEAVE TO AMEND.

**i. First Amendment**

The HJTA's First Amendment claim contains significant overlap with the NAGR Plaintiffs' First Amendment challenges. Compare HJTA Compl. ¶¶ 17-19 with NAGR FAC ¶¶ 107-112. As one example, both HJTA and NAGR Plaintiffs rely on *Janus* for the proposition that compelled subsidies violate the First Amendment right not to associate. See HJTA Opp. 10-11.

For largely the same reasons discussed above at Section III(A)(i), the Court finds that HJTA Plaintiffs' First Amendment claim against the Fee Provision is not ripe. The Nonprofit and, more critically, its activities have not yet been determined, including whether the Nonprofit would be engaging in any speech or expressive activities in the first instance. See *supra* Section III(A)(i).

HJTA Plaintiffs' arguments to the contrary are inapposite. As an initial matter, their argument that this claim will be ripe by the time of the motion hearing is not well-taken. HJTA Opp. 6-7. "Ripeness is assessed based on the facts as they exist at the present moment," *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1205 (9th Cir. 2008), and, to date, the City has not yet promulgated regulations regarding the Nonprofit's activities. See, e.g., HJTA ECF No. 25. Moreover, with the benefit of hindsight, this argument turned out to be inaccurate, as the City had delayed implementation of the Ordinance pending this Court's order on preliminary injunctive relief. See NAGR ECF No. 64, at 7.

HJTA Plaintiffs also appear to argue that, because the HJTA Complaint was originally filed in state court pursuant to California's validation statutes, Cal. Civ. Proc. Code §§ 860, *et seq.*, this alone rebuts the City's justiciability arguments. HJTA Opp. 7; HJTA Compl. ¶ 8. To the extent HJTA Plaintiffs suggest that validation actions are not subject to typical justiciability requirements, this position has been rejected by California courts. See, e.g., *Wilson & Wilson v.*

1 *City Council of Redwood City*, 191 Cal. App. 4th 1559, 1579-81 (2011) (“To the extent that  
2 [plaintiff] appears to argue that validation actions are somehow exempt from ordinary rules of  
3 justiciability, it is incorrect. Like all other actions, validation actions must be justiciable.”); *City of*  
4 *Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 66–69 (2005) (“Even validation actions are not  
5 exempt from the traditional principle that a justiciable action must satisfy the requirements of both  
6 ripeness and standing.”), as modified on denial of reh’g (Feb. 28, 2005).

7 Finally, HJTA Plaintiffs argue that their claims are ripe because they face an “actual and  
8 well-founded fear that the challenged statute will be enforced.” HJTA Opp. 8 (quoting  
9 *Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013)). Although  
10 this may be a valid basis to argue HJTA Plaintiffs’ standing, the fear of enforcement does not  
11 respond to the City’s prudential ripeness arguments, which target the HJTA Complaint’s  
12 speculation regarding the Fee Provisions. Mot. HJTA 8-9; *see also* Aug. 3 Order 9-11  
13 (distinguishing constitutional ripeness from prudential ripeness). HJTA Plaintiffs take the position  
14 that it does not matter “whether the private payee is Moms For Gun Sense or the National Rifle  
15 Association” (HJTA Opp. 8); however, it is unclear whether the designated Nonprofit would be  
16 engaging in *any* speech or expressive activities, as opposed to simply providing non-expressive  
17 services. *See* HJTA Compl. ¶ 19 (“[T]he Ordinance forces San Jose gun owners . . . to fund [the  
18 Nonprofit’s] *message*. . .”) (emphasis added); *see also* Aug. 3 Order 9-10. Without the critical  
19 facts regarding the Nonprofit’s activities, the Court would be asked to speculate on the unknown  
20 activities of a faceless nonprofit to determine if such activities would involve compelled speech.  
21 The Court declines to prematurely adjudicate such “abstract disagreements.” *Thomas v.*  
22 *Anchorage Equal Rts. Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

23 Accordingly, the Court GRANTS the City’s motion as to HJTA Plaintiffs’ First  
24 Amendment claim. The HJTA Complaint’s First Cause of Action will be DISMISSED for lack of  
25 ripeness with LEAVE TO AMEND.

## 26 **ii. Unconstitutional Condition (Second Amendment)**

27 The second claim in the HJTA Complaint is titled, “Unconstitutional Condition,” asserting  
28 that the Fee “has placed a condition on the continued exercise of [federal and state constitutional]



rights.” HJTA Compl. ¶¶ 21-23; *see also* HJTA Opp. 14 (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013)).

The Ordinance as drafted does not “condition” the exercise of Second Amendment rights because there are no means by which a San Jose gun owner may be deprived of his or her firearm. *See* Mot. HJTA 6. As a result, the HJTA Complaint’s allegation that “any gun owner who fails to pay the required fee to the designated private organization may be forced to surrender his firearms” is a misinterpretation of the Ordinance. HJTA Compl. ¶ 22; *see also* HJTA Opp. 15 (“And if the price is not paid, the City will take that right away by confiscating the owner’s firearms.”). The Ordinance expressly states that its impoundment provision may only apply “[to] the extent allowed by law (Ordinance § 10.32.245), and the City openly admits that there is no state or federal law that would presently permit impoundment. Mot. HJTA 6. HJTA Plaintiffs have not provided any authority that the unconstitutional conditions doctrine can apply in the Second Amendment context where possession is not at risk.<sup>5</sup> They instead rely primarily on *Koontz*, a case involving a “special application” of the unconstitutional conditions doctrine in the Fifth Amendment Takings Clause context. 570 U.S. at 604. On these allegations, the HJTA Complaint fails to state a claim for unconstitutional conditioning of Second Amendment rights.

In addition to Second Amendment rights, HJTA Plaintiffs also alleges the unconstitutional conditioning of rights under the California Constitution, specifically the rights of “protecting property, and pursuing and obtaining safety.” HJTA Compl. ¶ 21 (citing Cal. Const. art. I, § 1). However, the California Supreme Court has already expressly declined to interpret a right to bear arms into the state constitution’s language regarding protection and safety. *Kasler v. Lockyer*, 23 Cal. 4th 472, 481 (2000) (“If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution’s declaration of rights, they are simply wrong. No mention is made in it of a right to bear arms.”). To the extent HJTA Plaintiffs attempt to leverage

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<sup>5</sup> Indeed, the U.S. Supreme Court had tacitly acknowledged that reasonable and non-exorbitant fees are permissible in firearm permit schemes, which much more directly implicate firearm possession. *See Bruen*, 142 S. Ct. at 2138 n.9.

1 *Bruen* to somehow limit the holding in *Kasler* (see Hearing Tr. 21:16-23, HJTA ECF No. 28), the  
 2 U.S. Supreme Court’s interpretation of the Second Amendment is not binding on the California  
 3 Supreme Court’s interpretation of the California Constitution. See, e.g., *People v. Buza*, 4 Cal. 5th  
 4 658, 684 (2018) (“[T]he California Constitution is, and has always been, a document of  
 5 independent force that sets forth rights that are in no way dependent on those guaranteed by the  
 6 United States Constitution.”) (internal citation and quotation marks omitted). The Court,  
 7 therefore, declines to adopt an interpretation of California constitutional rights that conflicts with  
 8 the California Supreme Court’s holding in *Kasler*. 23 Cal. 4th at 481.

9 Accordingly, the Court GRANTS the City’s motion to dismiss HJTA Plaintiff’s  
 10 unconstitutional conditions claim. To the extent the claim relies on unconstitutional conditioning  
 11 of Second Amendment rights, the claim is dismissed WITH LEAVE TO AMEND. However, to  
 12 the extent HJTA Plaintiffs assert the unconstitutional condition of a California right, amendment  
 13 would be futile, as the California Supreme Court has expressed that there is no right to bear arms  
 14 in the California Constitution. Accordingly, this claim is dismissed WITHOUT LEAVE TO  
 15 AMEND insofar as it refers to unconstitutional conditioning of a California right.

### 16 **iii. Tax Lacking Voter Approval**

17 HJTA Plaintiffs’ third claim asserts a violation of the California Constitution’s voter  
 18 approval requirement for taxes and contains significant similarities to the corresponding claim in  
 19 the NAGR FAC. HJTA Compl. ¶¶ 25-31. The City moves to dismiss this claim on the same two  
 20 grounds it sought to dismiss the NAGR Plaintiffs’ claim: (1) the Fee at issue is not payable to the  
 21 City; and (2) the Fee falls under the “specific benefit” exception. Mot. HJTA 18-19.

22 As an initial matter, the Court notes that, although it has dismissed all of HJTA Plaintiffs’  
 23 claims over which it has original jurisdiction (*i.e.*, HJTA Plaintiffs’ first and second claims), the  
 24 Court nonetheless has discretion to continue exercising supplemental jurisdiction over the  
 25 remaining state claims under 28 U.S.C. § 1367(a). Because HJTA Plaintiffs’ remaining state  
 26 claims contain significant overlap with NAGR Plaintiffs’ voter-tax claim, the Court finds that  
 27 judicial economy favors exercising supplemental jurisdiction over HJTA Plaintiffs’ remaining  
 28 claims. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (noting that

1 supplemental jurisdiction is a “doctrine of discretion” rooted in “considerations of judicial  
2 economy, convenience and fairness to litigants”). However, to the extent that HJTA Plaintiffs  
3 continue to couch its claims as a state validation action, the Court is likely to decline supplemental  
4 jurisdiction over that uniquely California law procedure.

5 Turning to the merits of the voter-tax claim, the HJTA Complaint contains very limited  
6 factual allegations in support. The only fact alleged is that the City of San Jose imposed the Fee;  
7 the remaining allegations are largely legal conclusions couched in the language of article XIII C.  
8 *See* HJTA Compl. ¶¶ 25-30. Based on just the quantum of facts asserted, the HJTA Complaint  
9 falls short of the federal standard required by *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“A  
10 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
11 the reasonable inference that the defendant is liable for the misconduct alleged.”). Although  
12 HJTA Plaintiffs speculate in their opposition that the “City plans to form its own nonprofit  
13 organization, run by hand-picked people it will install, to carry out an agenda that the City codified  
14 in its ordinance” (HJTA Opp. 16), none of these facts are alleged in their operative pleading.

15 Furthermore, the most relevant interpretation of article XIII C is *Schmeer*, which held that,  
16 to be a tax under the California Constitution, a charge must be “payable to, or for the benefit of, a  
17 local government.” 213 Cal. App. 4th at 1329; *see also supra* Section III(A)(iv). As the HJTA  
18 Complaint alleges, the Fee is to be paid to a Designated Nonprofit Organization instead of to the  
19 local government. HJTA Compl. ¶ 11. This allegation on its face would seem to place the Fee  
20 beyond the scope of article XIII C per *Schmeer*, especially in the absence of factual allegations to  
21 the contrary.

22 Because the HJTA Complaint has failed to plead facts sufficient to state a claim under  
23 federal standards, the Court will GRANT the City’s motion to dismiss HJTA Plaintiffs’ third  
24 claim regarding a tax lacking voter approval. As the Court discussed *supra* at Section III(A)(iv),  
25 the Court cannot determine that leave to amend would be futile. Accordingly, this claim will be  
26 DISMISSED WITH LEAVE TO AMEND.

27 **iv. Unconstitutional Delegation of Taxing Power**

28 HJTA Plaintiffs’ final claim asserts that the City unconstitutionally delegated its municipal

1 power to collect taxes and appropriate tax revenues by requiring the Fee be paid to the Nonprofit  
2 designated by the City Manager. HJTA Compl. ¶¶ 33-35. HJTA Plaintiffs acknowledge,  
3 however, that this claim could only prevail if their third claim—whether the Fee constitutes a tax  
4 lacking voter approval—also prevails. HJTA Opp. 17-18.

5 The relevant portion of the California Constitution is article XIII, section 31, which simply  
6 states in full, “The power to tax may not be surrendered or suspended by grant or contract.” Cal.  
7 Const., art. XIII, § 31. Here, the HJTA Complaint contains no allegations that the City has entered  
8 into any grant or contract with the Nonprofit to collect the Fee revenues. *See* HJTA Compl. ¶¶ 35-  
9 37. HJTA Plaintiffs’ opposition also admits that “no specific contract or grant exists yet” and that  
10 “Plaintiffs cannot be faulted for not specifically identifying something that doesn’t yet exist.”  
11 HJTA Opp. 19. These acknowledgments indicate to the Court that HJTA Plaintiffs’  
12 unconstitutional delegation claim is unripe, which is an issue of subject matter jurisdiction that the  
13 Court’s must resolve *sua sponte* before reaching the merits of the claim. *See, e.g., Ruhrgas AG*,  
14 526 U.S. at 577 (“[J]urisdiction generally must precede merits in dispositional order.”).

15 A claim is not ripe if the issues are not fit for judicial decision and there would not be any  
16 hardship to the parties for withholding court consideration. *See Bishop Paiute*, 863 F.3d at 1153-  
17 54. Here, because section 31 includes the specific language of “surrendered or suspended *by grant*  
18 *or contract*,” the absence of any grant or contract would significantly hamper the Court’s ability to  
19 evaluate whether the power to tax has been “surrendered or suspended.” This is precisely the type  
20 of “abstract disagreements” and “premature adjudication” that courts are often advised to avoid.  
21 *Thomas v. Anchorage Equal Rts. Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000). Furthermore,  
22 there would be no hardship to HJTA Plaintiffs for withholding consideration, as the Fee would not  
23 impose an “immediate and significant change in plaintiffs’ conduct of their affairs with serious  
24 penalties attached to noncompliance.” *Wolfson*, 616 F.3d at 1060; *see also* Aug. 3 Order 11.

25 Because there is no current grant or contract that the Court can evaluate to determine if the  
26 City has “surrendered or suspended” its power to tax, the Court finds that HJTA Plaintiffs’ fourth  
27 claim for unconstitutional delegation is not ripe for adjudication. Accordingly, the Court will  
28 GRANT the City’s motion to dismiss this claim with LEAVE TO AMEND.

**IV. ORDER**

For the foregoing reasons, IT IS HEREBY ORDERED that Defendants' motions to dismiss are GRANTED IN PART and DENIED IN PART, as follows:

1. Defendants' motion to dismiss Claims 1, 2, 4, and 5 of the NAGR FAC is GRANTED, and the claims are DISMISSED with LEAVE TO AMEND;
2. Defendants' motion to dismiss Claim 3 of the NAGR FAC is GRANTED, and the claim is DISMISSED WITHOUT LEAVE TO AMEND;
3. Defendants' motion to dismiss Claim 6 of the NAGR FAC is DENIED;
4. Defendants' motion to dismiss Claims 1, 3, and 4 of the HJTA Complaint is GRANTED, and the claims are DISMISSED with LEAVE TO AMEND;
5. Defendants' motion to dismiss Claim 2 of the HJTA Complaint is GRANTED, and the claim is DISMISSED with LEAVE TO AMEND to the extent it relies on Second Amendment rights and DISMISSED WITHOUT LEAVE TO AMEND to the extent it relies on California Constitution rights.
6. To the extent any of HJTA Plaintiffs' claims are denominated as validation actions pursuant to Cal. Civ. Proc. Code §§ 860, *et seq.*, in an amended complaint, the Court may decline to exercise supplemental jurisdiction over those claims.

NAGR Plaintiffs and HJTA Plaintiffs shall file an amended consolidated complaint by February 2, 2023, and shall set forth whether each claim is brought by only certain plaintiffs or all plaintiffs. The lengthy time for amendment is granted so that Plaintiffs' claims may become ripe upon the City's enactment of further implementing regulations as contemplated by the Ordinance's express terms.

**IT IS SO ORDERED.**

Dated: September 30, 2022

  
 BETH LABSON FREEMAN  
 United States District Judge

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

NATIONAL ASSOCIATION FOR GUN  
RIGHTS, INC., et al.,

Plaintiffs,

v.

CITY OF SAN JOSE, et al.,

Defendants.

Case No. 22-cv-00501-BLF

**ORDER CONSOLIDATING RELATED  
CASES**

HOWARD JARVIS TAXPAYERS  
ASSOCIATION, et al.,

Plaintiffs,

v.

CITY OF SAN JOSE,

Defendant.

Case No. 22-cv-02365-BLF

On April 20, 2022, the Court issued Orders to Show Cause Why Cases Should Not Be Consolidated in both of the above referenced cases. Order to Show Cause, No. 22-cv-00501-BLF, ECF No. 52; Order to Show Cause, No. 22-cv-02365-BLF, ECF No. 6.

Plaintiffs National Association for Gun Rights, Inc. and Mark Sikes (collectively, “NAGR Plaintiffs”) have not opposed consolidation, so long as it does not delay the Court’s decision on their motion for preliminary injunction, which the Court has already issued. *See* NAGR Pls.’ Response to Order to Show Cause, No. 22-cv-00501, ECF No. 54. Plaintiffs in Case No. 22-cv-02365 (“HJTA Plaintiffs”) have objected to consolidation to the extent it would add delay and expense to their case by requiring an evidentiary trial. *See* HJTA Pls.’ Response to Order to Show Cause, No. 22-cv-02365, ECF No. 15. Defendants in both cases have not opposed consolidation

United States District Court  
Northern District of California

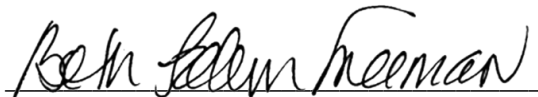
1 and take the position that the cases should be consolidated for all purposes. *See* Defs.’ Response  
 2 to Order to Show Cause, No. 22-cv-00501, ECF No. 53; Response to Order to Show Cause, No.  
 3 22-cv-02365, ECF No. 14.

4 “If actions before the court involve a common question of law or fact, the court may . . .  
 5 consolidate the actions.” Fed. R. Civ. P. 42(a). The “district court has broad discretion under this  
 6 rule to consolidate cases pending in the same district.” *Investors Research Co. v. U.S. Dist. Court*  
 7 *for Cent. Dist. of California*, 877 F.2d 777, 777 (9th Cir. 1989). Here, these two cases share  
 8 several common questions of both law and fact. Both NAGR Plaintiffs and HJTA Plaintiffs assert  
 9 claims arising under the First Amendment and article XIII C of the California Constitution. *See*  
 10 First Amended Complaint (“NAGR Compl.”) ¶¶ 106-115, 122-133, No. 22-cv-00501, ECF No.  
 11 19; Complaint (“HJTA Compl.”) ¶¶ 9-19, 24-31, No. 22-cv-02365, ECF No. 1. More broadly,  
 12 both sets of plaintiffs seek to enjoin or invalidate portions of the City of San Jose’s recent gun  
 13 harm ordinance. *See* NAGR Compl., at 25; HJTA Compl., at 8. Regarding HJTA Plaintiffs’  
 14 concerns of delays from an evidentiary trial, they are free to seek relief and accommodation under  
 15 a consolidated case should the need arise; however, these concerns do not outweigh the substantial  
 16 administrative benefits from consolidation at the present stage in the proceedings, given these  
 17 cases’ significant overlap.

18 Accordingly, the Court CONSOLIDATES Case Nos. 22-cv-00501 and 22-cv-02365 for all  
 19 purposes. For administrative purposes, the docket in the later-filed case, No. 22-cv-02365, shall  
 20 be closed.

21 **IT IS SO ORDERED.**

22 Dated: September 30, 2022

23   
 24 BETH LABSON FREEMAN  
 United States District Judge

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

**NATIONAL ASSOCIATION FOR GUN  
RIGHTS, INC.**, a non-profit corporation, and  
**MARK SIKES**, an individual,

Plaintiffs,

v.

**CITY OF SAN JOSE**, a public entity,  
**JENNIFER MAGUIRE**, in her official capacity  
as City Manager of the City of San Jose, and the  
**CITY OF SAN JOSE CITY COUNCIL**,

Defendants.

**HOWARD JARVIS TAXPAYERS  
ASSOCIATION**; Silicon Valley Taxpayers  
Association; Silicon Valley Public Accountability  
Foundation; James Barry; and George Arrington,

Plaintiffs,

v.

Case No. 5:22-cv-00501-BLF

**DEFENDANTS' CORRECTED STATUS  
REPORT ON IMPLEMENTATION OF  
THE GUN HARM REDUCTION  
ORDINANCE**

[Replacing Version of Status Report Inadvertently  
Filed on August 16, 2022, at ECF 77]

Case No. 5:22-cv-02365-BLF

[Replacing Version of Status Report Inadvertently  
Filed on August 16, 2022, at ECF 24]

Defendants' Corrected Status Report on Implementation of the Gun Harm Reduction Ordinance  
Case Nos. 5:22-cv-00501-BLF, 5:22-cv-02365-BLF, 5:22-cv-02533-BLF



Case 5:22-cv-00501-BLF Document 78 Filed 08/17/22 Page 2 of 7

**CITY OF SAN JOSE**, and all persons interested  
in the matter of San Jose Ordinance No. 30716,  
establishing an Annual Gun Harm Reduction Fee,

Defendants.

**CHRISTOPHER GLASS** and  
**FIREARMS POLICY COALITION, INC.**,

Plaintiffs,

v.

**CITY OF SAN JOSE**;  
**ANTHONY MATA**, in his official capacity as  
Chief of Police of the City of San Jose; and  
**JENNIFER MAGUIRE**, in her official capacity  
as City Manager of the City of San Jose,

Defendants.

Case No. 5:22-cv-02533-BLF

[Replacing Version of Status Report Inadvertently  
Filed on August 16, 2022, at ECF 35]

Defendants' Corrected Status Report on Implementation of the Gun Harm Reduction Ordinance  
Case Nos. 5:22-cv-00501-BLF, 5:22-cv-02365-BLF, 5:22-cv-02533-BLF

**SER-033**

Defendants City of San Jose, City Manager Jennifer Maguire, and the City of San Jose City Council (collectively, the “City”) provide the following Status Report to the Court and the parties in these three related actions, concerning the City’s ongoing efforts to implement the San Jose Gun Harm Reduction Ordinance (“Ordinance”) at issue in these cases.

Since the Ordinance was approved by the City Council on February 8, 2022, the City has been working diligently to develop regulations and administrative procedures, and take other actions necessary to ensure the Ordinance, when fully implemented, will have the administrative infrastructure it needs to function effectively. On July 8, 2022, the City updated the Court that, notwithstanding the Ordinance’s effective date of August 8, 2022, the City Manager’s Office (“CMO”) announced it was delaying implementation of the Ordinance’s insurance and fee requirements while it continued to work diligently to effectuate the Ordinance’s terms. *See NAGR Action*, ECF 64, at 7. In that update, the City referred the Court to the *Memorandum from Sarah Zárate to San Jose Mayor and City Council Re: Gun Harm Reduction Ordinance Update* (July 1, 2022), available at <https://www.sanjoseca.gov/home/showpublisheddocument/87508> (“July Memorandum”). *NAGR Action*, ECF 64, at 7. The July Memorandum contains a table titled “Implementation Timeline,” which lists the tasks the City needs to complete to implement the Ordinance, notes which tasks have already been completed, and provides estimated completion dates for those yet to be accomplished. July Memorandum at 3-5.

The July Memorandum continues to provide an accurate list of the anticipated work the City will, or has, undertaken to implement the Ordinance. Defendants now provide an update on the City’s progress in completing each relevant task.

#### The Gun Harm Reduction Fee

As the City has previously informed the Court, the City has not set a date for when enforcement of the Fee requirement will begin, nor has it designated the nonprofit organization to which the Fee must be paid. *See July Memorandum* at 2; Ordinance § 10.32.215. The CMO estimates that the contract with the yet-to-be-designated nonprofit organization will be finalized in December 2022, which is a prerequisite to the City beginning to enforce the Fee requirement. *See July Memorandum* at 2, 5.

On June 14, 2022, however, the City Council did take an initial step toward establishing the Fee, as noted in the July Memorandum. *Id.* at 1 (¶ 2), 3, 5. The Ordinance requires the Fee “be set forth

1 in the schedule of fees and charges established by resolution of the City Council.” § 10.32.215. By way  
 2 of the City’s customary annual budget process, the schedule of fees and charges is presented to the City  
 3 Council for approval in June, immediately prior to the beginning of the City’s fiscal year on July 1.  
 4 Each of those fees and charges must be associated with the budget of a particular City department in  
 5 order to properly pass through the City’s budgetary process and be approved.

6 With these requirements in mind, the City Council, after a public hearing, voted in June 2022 to  
 7 approve the City’s “Fee and Charges Report” for the 2022-2023 fiscal year, which included the Fee as  
 8 part of the City Police Department’s annual budget and set a placeholder Fee amount of \$25 per gun-  
 9 owning household, along with the express caveat that the \$25 Fee would not be enforced at this time.  
 10 See July Memorandum at 1, 3, 6; San Jose City Council Resolution No. 80571 § 29 (June 14, 2022),  
 11 available at <https://records.sanjoseca.gov/Resolutions/RES80571.pdf>; San Jose Office of the City  
 12 Manager, *Proposed 2022-2023 Fees & Charges Report*, at pp. xiv, C-26, 119 (May 2022), available at  
 13 <https://www.sanjoseca.gov/home/showpublisheddocument/85569/637877133876630000>; see also  
 14 *Memorandum from Jim Shannon to San Jose Mayor and City Council Re: 2022-2023 Adopted Fees*  
 15 *and Charges* (July 7, 2022), available at [https://www.sanjoseca.gov/home/showpublisheddocument](https://www.sanjoseca.gov/home/showpublisheddocument/87810/637932316704370000)  
 16 [/87810/637932316704370000](https://www.sanjoseca.gov/home/showpublisheddocument/87810/637932316704370000) (indicating the Proposed 2022-2023 Fees & Charges Report was  
 17 approved by the City Council). This action was undertaken as a first step for the City to retain the  
 18 possibility of enforcing the Fee requirement at any time during the City’s 2022-2023 fiscal year. The  
 19 \$25 amount was chosen because it is consistent with the Mayor’s public direction, made before the  
 20 Ordinance was adopted and before any litigation was initiated, that the City Council establish the Fee at  
 21 “\$25 per gun-owning household.” See *Memorandum from Mayor Licardo to San Jose City Council*  
 22 (Jan. 21, 2022), available at [https://sanjose.legistar.com/View.ashx?M=F&ID=10421783&GUID](https://sanjose.legistar.com/View.ashx?M=F&ID=10421783&GUID=133AE89A-69E1-45E9-BE91-145F9DD29089)  
 23 [=133AE89A-69E1-45E9-BE91-145F9DD29089](https://sanjose.legistar.com/View.ashx?M=F&ID=10421783&GUID=133AE89A-69E1-45E9-BE91-145F9DD29089). The Police Department was selected as the most  
 24 logical City Department to assign the Fee to for budgetary purposes because that is the Department that  
 25 will ultimately be responsible for enforcing the Ordinance via administrative citation. See Ordinance  
 26 § 10.32.240.

27 However, this action by the City Council did not permanently set the Fee; it merely completed  
 28 the first of two steps necessary to enforce the Fee requirement by ensuring the Fee is listed on the

1 City's Fee and Charges Report. The second step required to set the Fee is that the CMO, after it has  
2 completed all necessary prerequisites to enforcing the Fee (i.e., after the nonprofit organization has  
3 been designated and the City has secured a contract with the nonprofit), will have to re-appear before  
4 the City Council and ask it to vote on and approve the CMO's authority to begin requiring payment of  
5 the Fee. As part of this same process and vote, the City Council has the power to change the Fee to  
6 whatever amount it deems appropriate. In other words, when this second vote on the Fee occurs, the  
7 City Council may choose the keep the Fee at the current \$25 placeholder amount, or it may set another  
8 amount.<sup>1</sup>

9 In sum, while a placeholder Fee amount of \$25 was used for the first step of including the Fee  
10 in the City's annual budgetary process, the nonprofit organization to which the Fee must be paid has  
11 not yet been designated, additional City Council action is required before the CMO can begin enforcing  
12 the Fee requirement, and the amount of the Fee is still subject to change. Because of this, the fact that  
13 the City included the Fee on the 2022-2023 Fee and Charges Report with a placeholder amount of \$25  
14 does not materially affect the ripeness analysis, or indeed any other issue that has been briefed by the  
15 parties in these related actions. Indeed, it is the evolving nature of the implementation process and  
16 underdeveloped factual record that makes judicial review of the Ordinance difficult and inappropriate  
17 at this time.

#### 18 The Liability Insurance Mandate

19 As noted in the July Memorandum, the CMO has issued regulations suspending implementation  
20 of the Ordinance's liability insurance mandate, while it finalizes the procedures and attestation form  
21 necessary to implement it, including regulations necessary to flesh out the criteria for the Ordinance's  
22 "financial hardship" exemption. July Memorandum at 3. The City is also developing a robust outreach  
23

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24 <sup>1</sup> The City's undersigned counsel did not become aware that the Fee was listed on the City's Fees and  
25 Charges Report and was voted on by the City Council in June until after the most recent hearing in  
26 these matters, on August 4, 2022. Counsel regrets and apologizes to the Court for not being able to  
27 inform it of this update earlier and will ensure any future material development in the implementation  
28 of the Ordinance will be promptly brought to the Court's attention.

1 plan to ensure gunowners understand their responsibilities and have sufficient time to connect with  
 2 their current and (if necessary) potential new insurance providers. Enforcement of the insurance  
 3 mandate is estimated to begin in January 2023 at the earliest. *Id.* at 2.

4 The City's Ongoing Implementation Activities

5 The City is actively working to complete additional tasks necessary to implement the  
 6 Ordinance. By way of non-exhaustive examples, the City still must prepare a self-attestation form for  
 7 gunowners to certify compliance with the Ordinance's insurance requirement, revise the CMO's  
 8 regulations to establish the form and procedure necessary to implement the insurance requirement  
 9 (including criteria and procedures for implementing the financial hardship exemption), return to the  
 10 City Council with proposed fine amounts for violation of the Ordinance, and finalize the enforcement  
 11 and appeal procedure for administrative citations for violations of the Ordinance. *See, e.g.*, July  
 12 Memorandum at 3-5. The City must also designate the nonprofit organization that will collect the Fee  
 13 and, to that end, will engage in outreach and a Request For Information process, to solicit proposals  
 14 from any appropriate organizations qualified to effectuate the Ordinance's purposes. *Id.*<sup>2</sup>

15 On July 1, 2022, in an effort to be fully transparent with the public about the work it is doing to  
 16 implement the Ordinance and the anticipated schedule, the City launched a website to provide ready  
 17 access to the CMO's implementing regulations and provide information on the current implementation

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18  
 19 <sup>2</sup> References in the July Memorandum to "implementation delays due to litigation" and "[a]ssess[ing]  
 20 litigation status" (July Memorandum at 2, 4) referred only to awaiting the outcome of the preliminary  
 21 injunction motion in the *NAGR* Action, which has now been decided by the Court. *See NAGR* Action,  
 22 ECF 72, Order Denying Mot. for Prelim. Inj. (Aug. 3, 2022). The City is not slowing or pausing its  
 23 implementation activities pending any further proceedings in this Court. *See Memorandum from Sarah*  
 24 *Zarate to San Jose Mayor and City Council Re: Gun Violence Study Session* at 4 (Aug. 11, 2022),  
 25 available at [https://sanjose.legistar.com/View.ashx?M=F&ID=11130885&GUID=60097F28-A405-](https://sanjose.legistar.com/View.ashx?M=F&ID=11130885&GUID=60097F28-A405-4B25-BBF3-4829035BE295)  
 26 [4B25-BBF3-4829035BE295](https://sanjose.legistar.com/View.ashx?M=F&ID=11130885&GUID=60097F28-A405-4B25-BBF3-4829035BE295) ("Legal challenges against the ordinance are still pending, but with the  
 27 recent denial of preliminary injunctions in those cases, staff will proceed to implement the ordinance as  
 28 outlined in the work plan.").

1 status of the Ordinance. This information can be found on the City of San Jose Police Department's  
2 website under Documents & Policies: Gun Ordinances FAQ. *See* <https://www.sjpd.org/records>  
3 [/documents-policies/gun-ordinances-faq](https://www.sjpd.org/records/documents-policies/gun-ordinances-faq). The City Council also held a public Gun Violence Prevention  
4 Study Session on August 15, 2022, for which the CMO provided a memorandum with further updates  
5 about the anticipated schedule for implementing the Ordinance. *See Memorandum from Sarah Zárate*  
6 *to San Jose City Council Re: Gun Violence Prevention Study Session* (Aug. 11, 2022), available at  
7 [https://sanjose.legistar.com/View.ashx?M=F&ID=11130885&GUID=60097F28-A405-4B25-BBF3-](https://sanjose.legistar.com/View.ashx?M=F&ID=11130885&GUID=60097F28-A405-4B25-BBF3-4829035BE295)  
8 [4829035BE295](https://sanjose.legistar.com/View.ashx?M=F&ID=11130885&GUID=60097F28-A405-4B25-BBF3-4829035BE295).

9 The City will provide additional updates to the Court as appropriate, within ten days of any  
10 further material development in the City's ongoing effort to implement the Ordinance.

11  
12 Dated: August 17, 2022

Respectfully submitted,

13 **COTCHETT, PITRE & McCARTHY, LLP**

14  
15 By: /s/ Tamarah P. Prevost

16 Joseph W. Cotchett

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17 Andrew F. Kirtley

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18 *Attorneys for Defendants City of San Jose, et al.*  
19  
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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

NATIONAL ASSOCIATION FOR GUN  
 RIGHTS, INC., et al.,

Plaintiffs,

v.

CITY OF SAN JOSE, et al.,

Defendants.

Case No. 22-cv-00501-BLF

**ORDER DENYING MOTION FOR  
 PRELIMINARY INJUNCTION**

[Re: ECF No. 25]

The City of San Jose passed the Reduction of Gun Harm – Liability Insurance Requirement and Gun Harm Reduction Fee ordinance on January 25, 2022.<sup>1</sup> In the preamble, the City determined that the Ordinance was an exercise of its police powers “for the protection of the welfare, peace and comfort of the residents of the City of San Jose.” This suit was filed the same day.

Plaintiffs National Association for Gun Rights, Inc. (“NAGR”) and Mark Sikes (collectively “Plaintiffs”) bring suit against Defendants City of San Jose (the “City”), the City Manager Jennifer Maguire, and City of San Jose City Council (collectively “Defendants”) to challenge Part 6 of Chapter 10.32 of Title 10 (§§ 10.32.200- 10.32.250) of the City of San Jose’s local ordinances (the “Ordinance”). *See* First Amended Complaint (“FAC”), ECF No. 19. The Ordinance at issue purports “to reduce gun harm by: (a) requiring gun owners to obtain and maintain liability insurance; and (b) authorizing a fee to apply to gun harm reduction programs.” *Id.* ¶ 19. Plaintiffs assert that the Ordinance violates their Second Amendment and First Amendment rights (First and Second Claims), the California Constitution (Third and Fourth

<sup>1</sup> The Ordinance’s second reading and enactment occurred on February 8, 2022.

1 Claims), and the City of San Jose’s City Charter (Fifth Claim). *Id.* ¶¶ 82-146.

2 Shortly after commencing suit, Plaintiffs filed the present Motion for Preliminary  
3 Injunction (“Motion”) to enjoin enforcement of the Ordinance, which was initially scheduled to go  
4 into effect on August 8, 2022 but the implementation of which has since been delayed past  
5 December 2022. Pls.’ Mot. Prelim. Inj. 9, ECF No. 25; Defs.’ Suppl. Br. 7, ECF No. 64. On June  
6 23, 2022—after the Motion was briefed but before the hearing—the Supreme Court of the United  
7 States issued its opinion in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111  
8 (2022), altering the framework under which both parties briefed the Motion. This Court  
9 subsequently ordered the parties to file supplemental briefs addressing *Bruen* and the proper legal  
10 standard for evaluating the Second Amendment issues in the Motion. ECF No. 62. The Court has  
11 considered the parties’ initial and supplemental briefing, the *amicus curiae* brief and response, and  
12 the oral arguments presented on July 14, 2022. For the reasons discussed below, Plaintiffs’  
13 Motion is DENIED.

#### 14 **I. BACKGROUND**

15 On June 29, 2021, the San Jose City Council directed City Attorney Nora Frimann to  
16 return to Council with an ordinance requiring San Jose gun owners to “obtain and maintain a City-  
17 issued document evincing payment of an annual fee, and attestation of insurance coverage for  
18 unintentional firearm-related death, injury, or property damage.” FAC ¶ 18. On January 14, 2022,  
19 the City Attorney returned with a recommendation for an ordinance “(a) requiring gun owners to  
20 obtain and maintain liability insurance; and (b) authorizing a fee to apply to gun harm reduction  
21 programs.” *Id.* ¶ 19. On January 25, 2022, the City Council initially approved the Ordinance,  
22 and, on February 8, 2022, the Council voted to finally approve Ordinance No. 30716. *Id.* ¶ 26.

23 Plaintiff NAGR describes itself as a nonprofit grassroots organization dedicated to  
24 defending the Second Amendment right to keep and bear arms. *Id.* ¶ 13. Its members include San  
25 Jose residents who would be subject to the Ordinance. Plaintiff Sikes is a San Jose resident, who  
26 legally owns a gun and would be subject to the Ordinance if it were to go into effect. *Id.* ¶ 14.

#### 27 **A. The Ordinance**

28 Ordinance No. 30716 is comprised of four sections, with the first section containing the



operative provisions of Part 6 to Title 10 of the San Jose Municipal Code. *See* FAC, Ex. K. Part 6 contains sections §§ 10.32.200-10.32.250 and is titled, “Reduction of Gun Harm – Liability Insurance Requirement and Gun Harm Reduction Fee” (the “Ordinance”). *Id.* at 5-12. The second, third, and fourth sections establish the Ordinance’s effective date, its severability, and the bases for the City Council’s action in passing the Ordinance, respectively.

**i. Insurance Requirement**

The Ordinance itself begins with a recitation of the City’s authority to adopt the Ordinance, its purpose, and specific factual findings propelling the City’s action. Ordinance § 10.32.200. The first operative provision requires San Jose residents who own or possess a firearm to obtain a homeowner’s, renter’s, or gun liability insurance policy “covering losses or damages resulting from any accidental use of the Firearm.” *Id.* § 10.32.210 (the “Insurance Requirement”).

**ii. Gun Harm Reduction Fee**

The second main provision is the requirement for San Jose gun owners to pay an Annual Gun Harm Reduction Fee (the “Fee”) to a Designated Nonprofit Organization (the “Nonprofit”), selected by the City Manager. *Id.* § 10.32.215, 10.32.235. The Fee amount will be established by City Council, and every dollar generated must be used by the Nonprofit to provide “services to residents of the City that own or possess a [f]irearm in the City, to members of their household, or to those with whom they have a close familial or intimate relationship.” *Id.* § 10.32.220(A). The Ordinance instructs the Nonprofit to spend the funds generated from the Fee exclusively for programs and initiatives designed to “(a) reduce the risk or likelihood of harm from the use of firearms in the City of San Jose, and (b) mitigate the risk of physical harm or financial, civil, or criminal liability that a San Jose firearm owner or her family will incur through her possession of firearms.” *Id.* § 10.32.220(C). The Ordinance also provides a non-exhaustive list of services the Nonprofit may provide, which include suicide prevention, violence reduction, addiction intervention, substance abuse, mental health services relating to gun violence, and firearms safety education. *Id.* § 10.32.220(A)(1)-(5). Proceeds generated by the Fee may not be used for litigation, political advocacy, or lobbying activities nor may the City “specifically direct how the monies from the Gun Harm Reduction Fee are expended.” *Id.* §§ 10.32.220(B)-(C).

1                   **iii. Compliance and Implementation**

2           San Jose residents who are required to obtain and maintain insurance must maintain a City-  
3 designated attestation form, to which they must also affix proof of payment of the Fee. Ordinance  
4 § 10.32.230. The Ordinance exempts peace officers, persons with concealed carry licenses, and  
5 persons for whom compliance would create a “financial hardship” from complying with its  
6 provisions. *Id.* § 10.32.225.

7           Any violation of the Ordinance is punishable by an administrative citation with fines to be  
8 established by City Council. *Id.* § 10.32.240. Additionally, the Ordinance prospectively would  
9 permit the impoundment of any non-compliant person’s firearm, subject to a due process hearing  
10 and to the extent allowed by law. *Id.* § 10.32.245. That said, the City confirmed in its briefing  
11 and in oral arguments that there is currently no federal or state law authorizing the City to  
12 impound firearms under the Ordinance, and therefore, the impoundment provision is inoperable  
13 absent some future change in the applicable law. *See* Defs.’ Opp. Mot. Prelim. Inj. (“Opp.”), at 3.

14           The Ordinance authorizes the City Manager to promulgate all regulations necessary to  
15 implement the requirements and fulfill the policies of the Ordinance, including designating the  
16 Nonprofit, providing guidelines on and auditing the use of the Fee, and establishing the criteria for  
17 the “financial hardship” exemption. *Id.* § 10.32.235. The Ordinance also authorizes the City  
18 Manager to collect any cost recovery fees associated with fulfilling the policies of the Ordinance.  
19 *Id.* § 10.32.250.

20           To date, the City Council and City Manager have not yet established the amount of the  
21 Fee, the amount of any administrative citation fines, or the identity of the Nonprofit. Opp. 3-4.

22                   **B. Procedural History**

23           On January 25, 2022, the same day as the City Council’s meeting to consider approving  
24 the Ordinance, Plaintiffs filed the original Complaint, seeking declaratory and injunctive relief  
25 from the Ordinance. *See* Compl. ¶ 16, ECF No. 1.

26           The First Amended Complaint asserts six claims for relief, including a claim under the  
27 Declaratory Judgment Act. First, Plaintiffs allege that the Ordinance violates their Second  
28 Amendment rights by requiring gun owners to purchase insurance and pay annual fees (First

1 Claim). FAC ¶¶ 82-105. Plaintiffs also claim the Fee constitutes a compelled subsidy in violation  
 2 of their First Amendment freedoms of speech and association (Second Claim). *Id.* ¶¶ 106-115.  
 3 The FAC asserts violations of the California Constitution, specifically that the State of California  
 4 has occupied the field of residential handgun possession to the exclusion of local governments  
 5 (Third Claim) and the Ordinance imposes fees that are in fact taxes subject to voter approval  
 6 (Fourth Claim). *Id.* ¶¶ 116-133. Finally, Plaintiffs allege that the Ordinance violates the San Jose  
 7 City Charter's budgeting and appropriation provisions, the delegation of executive functions, and  
 8 the requirement that all City revenues and receipts be deposited in the City's accounts (Fifth  
 9 Claim). *Id.* ¶¶ 134-146; *see also* FAC, Ex. A ("City Charter").

10 On March 8, 2022, Plaintiffs moved to enjoin the enforcement of the Ordinance, currently  
 11 scheduled to go into effect on August 8, 2022, though later postponed. Mot. 4; Defs.' Suppl. Br.  
 12 7. The City opposed, asserting ripeness objections in addition to substantive arguments. Opp. 4-  
 13 6. The Motion was fully briefed by March 29, 2022, with a hearing scheduled for July 14, 2022.  
 14 ECF Nos. 32 ("Reply"), 60.

15 On June 23, 2022, the Supreme Court of the United States issued its opinion in *New York*  
 16 *State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), which struck down New York  
 17 State's "may-issue" licensing regime and altered the Ninth Circuit's Second Amendment  
 18 framework. *See, e.g., Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021), abrogated by *Bruen*,  
 19 142 S. Ct. 2111.

20 On June 27, 2022, this Court ordered the parties to file supplemental briefs, addressing  
 21 *Bruen* and the proper legal standard for Plaintiffs' Second Amendment challenge. ECF No. 62.  
 22 On July 11, 2022, the Court received a request to file an *amicus* brief from Brady, a nonprofit  
 23 organization dedicated to reducing gun violence, which the Court granted. ECF No. 66, 69.

## 24 **II. LEGAL STANDARD**

### 25 **A. Ripeness**

26 "Ripeness is an Article III doctrine designed to ensure that courts adjudicate live cases or  
 27 controversies and do not issue advisory opinions or declare rights in hypothetical cases." *Bishop*  
 28 *Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1153 (9th Cir. 2017) (internal quotation marks and

brackets omitted). As an Article III doctrine of justiciability, ripeness must be established separately for each claim of relief sought. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352-53 (2006); *cf. City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 875 n.8 (9th Cir. 2009) (“[I]t is beyond question that every claim before us must meet minimum constitutional requirements for jurisdiction, such as ripeness.”). The ripeness inquiry contains both a constitutional and a prudential component. *See Bishop Paiute*, 863 F.3d at 1153. Constitutional ripeness is analyzed “under the rubric of standing because ripeness coincides squarely with standing’s injury in fact prong,” while prudential ripeness considers two overarching factors: “[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.” *Id.* 1153-54.

“A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (quoting *US W. Commc’ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). In considering the hardship to the parties, courts consider whether “withholding review would result in direct and immediate hardship and would entail more than possible financial loss,” as well as “whether the regulation requires an immediate and significant change in plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance.” *Wolfson*, 616 F.3d at 1060 (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009)).

#### **B. Preliminary Injunction**

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a preliminary injunction must establish “[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Id.* at 20. Alternatively, an injunction may issue where “the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in plaintiff’s favor,” provided that the plaintiff can also demonstrate the other two *Winter* factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (citation and internal quotation marks omitted).

A preliminary injunction should not be granted, “unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (italics in original). That said, “the burdens at the preliminary injunction stage track the burdens at trial.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). In cases where the government bears the burden as to the ultimate question of the challenged law’s constitutionality, the moving party must “mak[e] a colorable claim that its [constitutional] rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction.” *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022).

### III. DISCUSSION

Because the City’s ripeness challenges directly bear upon the Court’s jurisdiction and ability to reach the merits in this case, the Court first addresses the City’s ripeness arguments.

#### A. Ripeness

The City’s ripeness argument, although broadly asserted against the entire lawsuit, appears to focus only on the First and Second Amendment challenges to the Fee. The City asserts that Plaintiffs’ First Amendment challenge to the Fee is not ripe because Plaintiffs assume that the yet-to-be-designated Nonprofit’s activities will inevitably violate the First Amendment. Opp. 4-5. The City also argues that, because the City Council has not established the Fee amount yet, the Fee’s burden on Plaintiffs’ Second Amendment rights is uncertain, and thereby their Second Amendment challenge is also unripe. *Id.* at 6. The City does not argue that Plaintiffs’ challenges to the Insurance Requirement are unripe, nor does the City dispute constitutional ripeness, *i.e.*, the existence of an injury-in-fact. Rather, the City primarily argues the lack of prudential ripeness by disputing the fitness of the Fee for judicial determination at this time. *Id.* at 5.

Plaintiffs respond that pre-enforcement challenges to an ordinance are ripe where there is an “actual and well-founded fear that the challenged statute will be enforced.” Reply 3 (quoting *Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013)). They argue that there is nothing to suggest that the City will not enforce the Ordinance, and it is sufficient that the Ordinance would condition lawful gun ownership on making a financial donation and

1 acquiring liability insurance. *Id.*

2 **i. Ripeness of First Amendment Claim**

3 Plaintiffs' Complaint asserts that the mandatory Fee would infringe their First Amendment  
4 rights to free speech and free association. FAC ¶ 62. Because gunowners must pay the Fee  
5 regardless of whether they want to associate with or donate to the Nonprofit, the required Fee  
6 would be "[c]ompelling [them] to subsidize the speech of other private speakers." Mot. 15  
7 (quoting *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464  
8 (2018)). Plaintiffs compare the mandatory Fee to the mandatory union agency fees struck down in  
9 *Janus*, which were imposed on all relevant employees regardless of whether they were union  
10 members or agreed with the union's tactics. 138 S. Ct. at 2460.

11 The City responds that, as a threshold matter, Plaintiffs' challenges are unripe. The  
12 Nonprofit, the City argues, has not yet been designated nor have its activities been confirmed, so  
13 Plaintiffs are merely speculating that the Nonprofit will "inevitably hold the City's anti-gun  
14 biases" and be "hostile to gun ownership." Opp. 5, 16 (quoting Mot. 5, 8, 17).

15 In assessing whether this question is fit for judicial decision, the Court begins with the  
16 observation that the First Amendment freedom of association is closely, if not inextricably, tied to  
17 speech and expression. *See, e.g., Janus*, 138 S. Ct. at 2463 ("The right to eschew *association for*  
18 *expressive purposes* is likewise protected.") (emphasis added); *Knox v. Serv. Emps. Int'l Union*,  
19 *Loc. 1000*, 567 U.S. 298, 309 (2012) ("[T]he ability of like-minded individuals to *associate for the*  
20 *purpose of expressing* commonly held views may not be curtailed.") (emphasis added); *NAACP v.*  
21 *State of Ala. ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) ("It is beyond debate that freedom to  
22 engage in *association for the advancement of beliefs and ideas* is an inseparable aspect of the . . .  
23 freedom of speech.") (emphasis added).

24 The Supreme Court further defined the relationship between speech and association in  
25 *Keller v. State Bar of California*, which involved a state bar's mandatory membership dues. 496  
26 U.S. 1 (1990). There, the Supreme Court held that the compelled fee was justified by the State's  
27 interest in regulating the legal profession and, therefore, the state bar may use proceeds from the  
28 mandatory dues to constitutionally fund "activities germane to those goals" or "expenditures . . .

1 necessarily or reasonably incurred” for those goals. *Id.* at 14. However, *Keller* held that the state  
2 bar could not use the mandatory dues to fund “activities of an ideological nature,” drawing a  
3 distinction between activities that implicated speech and those that were “germane” to the  
4 association’s legitimate functions. *Id.*

5 Turning to the Nonprofit at issue, as yet, the Ordinance does not specify what the  
6 Nonprofit’s activities will be. Although the Ordinance lists five possible services that the  
7 Nonprofit may fund, that list is neither mandatory nor exhaustive. Ordinance § 10.32.220(A)  
8 (“Such expenditures may include, but are not necessarily limited to the following. . . .”). The only  
9 other indication of the Nonprofit’s activities is the Ordinance’s directive that the Nonprofit’s  
10 programs and initiatives be designed to “(a) reduce the risk or likelihood of harm from the use of  
11 firearms in the City of San Jose, and (b) mitigate the risk of physical harm or financial, civil, or  
12 criminal liability that a San Jose firearm owner or her family will incur through her possession of  
13 firearms.” Ordinance § 10.32.220(C). However, this broad mission statement does not inform the  
14 Court as to whether the Nonprofit’s activities will be permissibly “germane” to a justifiable state  
15 interest or impermissibly “ideological” in nature. *Keller*, 496 U.S. at 13-14.

16 It is also unclear whether the Fee would fund *any* kind of speech or expressive activities,  
17 much less anti-gun sentiments. *See* Ordinance § 10.32.220(A)-(C) (mentioning “services,”  
18 “programs,” and “initiatives”). For instance, one can readily envision a regulatory scheme in  
19 which the Nonprofit adopts a program that violates the First (and Second) Amendment, perhaps by  
20 undertaking a public service advertising campaign to reduce gun ownership. *Cf. United States v.*  
21 *United Foods, Inc.*, 533 U.S. 405 (2001) (holding that compelled subsidies used to fund industry  
22 advertisements unconstitutional under the First Amendment); *but cf. Glickman v. Wileman Bros.*  
23 *& Elliott*, 521 U.S. 457, 472–73 (1997) (“[O]ur cases provide affirmative support for the  
24 proposition that assessments to fund a lawful collective program may sometimes be used to pay  
25 for speech over the objection of some members of the group.”). However, one can also just as  
26 readily conceive of a program that may reduce gun harm without involving speech or other  
27 expressive activity, such as offering optional firearm safety training to first-time gun owners. *Cf.*  
28 *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (finding no First Amendment violation



1 where closure sanction of a bookstore was targeting non-expressive activity). Absent speculation  
 2 on the Nonprofit's activities, Plaintiffs' First Amendment claim "rests upon contingent future  
 3 events that may not occur as anticipated." *Texas v. U.S.*, 523 U.S. 296, 300 (1998). Because  
 4 "further factual development would significantly advance [the Court's] ability to deal with the  
 5 legal issues presented," the Court cannot say that the First Amendment claim is fit for judicial  
 6 decision. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (internal  
 7 quotation marks omitted).

8 Plaintiffs' arguments to the contrary are mostly inapposite. To start, although the City  
 9 argues that Plaintiffs' Fee challenges are *prudentially* unripe, Plaintiffs' response and cited  
 10 authorities only bear upon *constitutional* ripeness, with one case only summarily addressing  
 11 prudential ripeness in a footnote and another finding the case to be prudentially unripe. *Compare*  
 12 *Opp. 4-5 with Reply 3*; *see also Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867,  
 13 872 n.5 (9th Cir. 2013); *Nichols v. Brown*, 859 F. Supp. 2d 1118, 1135 (C.D. Cal. 2012)  
 14 ("Furthermore, this case is not ripe for review for prudential reasons as well."). As a result, the  
 15 generally undisputed allegation that the City intends to enforce the Ordinance does not rebut or  
 16 respond to the City's prudential ripeness argument where the Court does not know what the City  
 17 will be enforcing.

18 Plaintiffs also submit that the Nonprofit will "inevitably hold the City's anti-gun biases,"  
 19 will be "hostile to gun ownership," and will be "inherently political." Mot. 8; Reply 10. Such  
 20 viewpoints, however, are not apparent from the face of the Ordinance. True, the Ordinance  
 21 proposes five non-exhaustive examples of services the Nonprofit *may* (but not shall) provide.  
 22 Ordinance § 10.32.220(A)(1)-(5). However, Plaintiffs do not explain how suicide prevention,  
 23 violence reduction, addiction intervention, mental health services, or firearm safety training  
 24 necessarily evidence viewpoints that are "hostile" to gun ownership or are "inherently political."  
 25 And, as noted above, these programs may or may not even involve any speech or expressive  
 26 activities in the first instance. Without a concrete idea of the Nonprofit's actual programs and  
 27 activities, the Court is left "entangling [itself] in abstract disagreements." *Thomas v. Anchorage*  
 28 *Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

1 With respect to the “hardship to the parties of withholding court consideration,” the Fee  
 2 does not require an “immediate and significant change in plaintiffs’ conduct of their affairs with  
 3 serious penalties attached to noncompliance.” *Wolfson*, 616 F.3d at 1060. Here, the only change  
 4 in Plaintiffs’ conduct would be the preparation (if any) to potentially pay a fee, an obligation that  
 5 arises only if they do not qualify for the “financial hardship” exemption and is only punishable by  
 6 an administrative citation. Ordinance §§ 10.32.225, 10.32.240. Furthermore, the City does not  
 7 expect to finalize its contract with any non-profit before December 2022, Defs.’ Suppl. Br. 7, and  
 8 even so, there has been no indication as to the City Manager’s regulations establishing the “date  
 9 by which payment shall be made annually.” Ordinance § 10.32.215. Given that the Ordinance’s  
 10 Fee provision would not force an immediate change to Plaintiffs’ current conduct, the Court does  
 11 not find any hardship for withholding court consideration on Plaintiffs’ First Amendment  
 12 challenge to the Fee.

13 Because the Nonprofit has not yet been identified nor have its activities been determined,  
 14 the Court finds that Plaintiffs’ First Amendment challenge to the Fee is prudentially unripe.<sup>2</sup>

#### 15 **ii. Ripeness of Second Amendment Claim**

16 In response to Plaintiffs’ Second Amendment challenge to the Fee, the City argues that,  
 17 because the Fee’s amount has not yet been determined, whether the Fee would infringe upon  
 18 Plaintiffs’ Second Amendment rights beyond a *de minimis* burden is not fit for judicial  
 19 determination. Opp. 6. Plaintiffs respond that it is sufficient that “the Ordinance will condition  
 20 lawful gun ownership on the making of a financial donation to a nonprofit that the Ordinance  
 21 characterizes as a city ‘fee.’” Reply 3.

22 Whether an annual mandatory fee on gun owners violates the right to “keep and bear  
 23 Arms” will turn on the Fee amount and the City’s criteria for determining “financial hardship.”

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24  
 25 <sup>2</sup> Notwithstanding its assessment of the claim’s ripeness, the Court notes that the substance of  
 26 Plaintiffs’ First Amendment argument contains compelling points, especially regarding the  
 27 Supreme Court’s holding in *Janus*, 138 S. Ct. 2448. As the City Manager develops the regulations  
 28 applicable to the Fee, close attention to Plaintiffs’ arguments may be wise.

1 Ordinance §§ 10.32.215, 10.32.225. In and of itself, a fee that is merely associated with owning a  
2 firearm—and for which the failure to pay does not result in that ownership being revoked, Opp.  
3 3—would not necessarily be inconsistent with the “historical tradition of firearm regulation.”  
4 Indeed, the Supreme Court in *Bruen* expressly contemplated regulations that may permissibly  
5 include fee payments, so long as the fees were not so “exorbitant [so as to] deny ordinary citizens  
6 their right to public carry.” *Bruen*, 142 S. Ct. at 2138 n.9. Here, the Court cannot assess whether  
7 such a Fee would be so “exorbitant” as to infringe upon Plaintiffs’ rights without additional  
8 information on the Fee amount or the as-yet-to-be-determined “criteria by which a person can  
9 claim a financial hardship exemption.” Ordinance § 10.32.235(A)(4). Absent the promulgation of  
10 regulations on these two points, the Court would be left to issue an impermissible advisory  
11 opinion on the Ordinance’s constitutionality under the Second Amendment.

12 The hardships of withholding judicial consideration of Plaintiffs’ Second Amendment  
13 challenge to the Fee are identical to those arising from withholding consideration of Plaintiffs’  
14 First Amendment challenge. *See supra* Section III(A)(i). Plaintiffs are not threatened by “serious  
15 penalties attached to noncompliance” that would force them to make “an immediate and  
16 significant change” to their regular conduct. *Wolfson*, 616 F.3d at 1060. Even if the preparation  
17 to pay a fee could be considered significant, the obligation would certainly not be immediate, as  
18 the City has postponed the implementation and designation of the Nonprofit to at least December  
19 2022. Defs.’ Suppl. Br. 7. As a result, the Court’s decision to withhold judicial consideration  
20 would not impose any immediate or significant hardships to the parties.

21 Accordingly, both Plaintiffs’ First and Second Amendment challenges to the Fee provision  
22 are prudentially unripe, and the Court does not proceed to address those claims in its preliminary  
23 injunction analysis. Plaintiffs’ other challenges to the Fee provision—*i.e.*, that the Fee infringes  
24 upon a preempted field, violates the California voter approval tax requirement, and violates the  
25 City Charter—will be analyzed on their merits, as the City does not specifically dispute the  
26 ripeness of those claims. Opp. 4-6. Plaintiffs’ challenges to the Insurance Requirement will  
27 likewise also be considered.

28 The Court DENIES as unripe Plaintiff’s motion for preliminary injunction to the extent it

1 seeks to enjoin the Fee provision on First and Second Amendment grounds.

2 **B. Likelihood of Success**

3 Having addressed the threshold ripeness issues, the Court proceeds to whether Plaintiffs  
4 have shown that they are likely to succeed on the merits of their remaining claims. *See Winter*,  
5 555 U.S. at 20.

6 **i. Second Amendment**

7 Plaintiffs challenge both the Fee and Insurance Requirement under the Second Amendment  
8 (Claim 1), though only the Insurance Requirement is ripe for review. After the FAC was filed, the  
9 U.S. Supreme Court issued its opinion in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*,  
10 holding that New York State’s “may-issue” licensing regime—*i.e.*, where officials have discretion  
11 and *may issue*, rather than *shall issue*, concealed-carry licenses upon proof of proper cause—was  
12 unconstitutional. 142 S. Ct. 2111 (2022). In striking down the New York statute, the Supreme  
13 Court acknowledged and expressly rejected the “two-step” means-end scrutiny framework that  
14 Circuit Courts of Appeals (and the parties) have used to analyze Second Amendment challenges.  
15 *See id.* at 2127. In its place, *Bruen* pronounced a constitutional test adhering to the principles in  
16 *D.C. v. Heller*, that is, “a test rooted in the Second Amendment’s text, as informed by history.” *Id.*  
17 at 2127 (citing *D.C. v. Heller*, 554 U.S. 570, 576-77 (2008)). This motion for preliminary  
18 injunction is considered under the *Bruen* standard.

19 **a. The Bruen Framework**

20 *Bruen* articulates the Second Amendment constitutional standard as follows: “When the  
21 Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively  
22 protects that conduct. The government must then justify its regulation by demonstrating that it is  
23 consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2129–30. The  
24 Supreme Court further emphasized that “[t]o justify its regulation, the government may not simply  
25 posit that the regulation promotes an important interest.” *Id.* at 2126.

26 To determine whether the Second Amendment’s plain text covers an individual’s conduct,  
27 courts must first identify and delineate the specific course of conduct at issue, which in *Bruen* was  
28 “carrying handguns publicly for self-defense.” *Id.* at 2134. *Bruen* conducted a textual analysis of

1 the words “bear” and “keep” to determine whether the conduct of publicly carrying a firearm fell  
2 within the language of the Second Amendment. *Id.* at 2134-35.

3 If the conduct at issue is covered by the text of the Second Amendment, the burden then  
4 shifts to the government to show why the regulation is consistent with the Nation’s historical  
5 tradition of firearm regulation, specifically the periods closest to the adoption of the Second  
6 Amendment (1791) and the Fourteenth Amendment (1868). *Id.* at 2135-36. Courts need not  
7 themselves engage in “searching historical surveys” for potential regulatory analogues—they are  
8 “entitled to decide a case based on the historical record compiled by the parties.” *Id.* at 2130 n.6.  
9 If the parties are able to identify instances of historical firearm regulations, courts must reason by  
10 analogy to determine whether the two regulations are “relevantly similar.” *Id.* at 2132 (quoting  
11 Cass R. Sunstein, *On Analogical Reasoning Commentary*, 106 Harv. L. Rev. 741, 773 (1993)).  
12 Two relevant metrics for this comparison are “how and why the regulations burden a law-abiding  
13 citizen’s right to armed self-defense”; in other words, “whether modern and historical regulations  
14 impose a comparable burden on the right of armed self-defense and whether that burden is  
15 comparably justified.” *Id.* at 2132-33.

16 With this updated framework in mind to evaluate the Insurance Requirement’s  
17 constitutionality under the Second Amendment, the Court turns to the parties’ arguments.

18 b. Plain Text

19 The Court must first identify Plaintiffs’ “proposed course of conduct” and assess whether  
20 that conduct is covered by the Second Amendment’s plain text.<sup>3</sup> *Bruen*, 142 S. Ct. at 2134.

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21  
22 <sup>3</sup> As an initial note, Plaintiffs rely on the City’s prior concession that “[f]or the purposes of  
23 opposing the Motion, [the City] concede that the Ordinance imposes some minimal or slight  
24 burden.” Opp. 7. The City has since withdrawn that concession as not “constitutionally relevant”  
25 and argues that the Ordinance does not infringe upon conduct protected by the Second  
26 Amendment’s text. Defs.’ Suppl. Br. 3 n.1. The Court recognizes that both parties’ Second  
27 Amendment analysis likely changed in the wake of *Bruen* and will consider the City’s arguments,  
28 notwithstanding their prior concession made under a now-obsolete legal framework.

Neither Plaintiffs’ nor the City’s supplemental briefing specifies a course of conduct for the Court to analyze. *See* Pls.’ Suppl. Br. 3, ECF No. 65; Defs.’ Suppl. Br. 3-4. When prompted at oral arguments, Plaintiffs initially articulated the relevant conduct as requiring citizens to purchase insurance to avoid a penalty, but they later argue that the conduct is “the mere ownership of a gun.” Pls.’ Resp. Br. Brady Amicus Curiae 2, ECF No. 70. On the other hand, *amicus curiae* defined the conduct as “insuring liability that might arise from a firearm-related accident.” Br. Brady Amicus Curiae (“Brady Br.”) 3-4, ECF No. 66-1.

The Supreme Court provided limited guidance on how to define the proposed course of conduct—*Bruen* simply stated the conduct at issue with New York’s “may-issue” permitting scheme as “carrying handguns publicly for self-defense.” *Bruen*, 142 S. Ct at 2134. Extrapolating from the Supreme Court’s example and for purposes of evaluating this motion only, the Court defines the conduct at issue here as “owning or possessing a firearm without firearm liability insurance.”<sup>4</sup> This definition closely tracks Plaintiffs’ initial articulation of the conduct in question.

The Court recognizes that, because the impoundment provision is not operable under current law, the Insurance Requirement would not imperil the ownership or possession of anyone’s firearms. *See* Defs.’ Suppl. Br. 3-4; Brady Br. 3-4. However, even if ownership or possession is not threatened by impoundment, the requirement to obtain insurance is nonetheless triggered by the conduct of “own[ing] or possess[ing] a Firearm in the City.” Ordinance § 10.32.210(A). Under the “plain text” prong of the *Bruen* analysis, the Court only reviews Plaintiffs’ proposed conduct and the plain text of the Second Amendment. *Bruen*, 142 S. Ct at 2134. To the extent *Bruen* accounts for the degree to which Plaintiffs’ Second Amendment rights have been burdened, that analysis would occur under the “historical tradition” prong of the *Bruen* framework. *Id.* at 2149 (evaluating “the burden these surety statutes may have had on the right to

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<sup>4</sup> On a more developed record, the Court may reevaluate this description of the proposed conduct for purposes of the *Bruen* analysis. The Court also notes the strong arguments offered by *amicus* that the Second Amendment is not implicated by the Insurance Requirement or Fee provisions. Brady Br. 3-6. The Court will revisit this issue as the case proceeds.

1 public carry” and determining that the burden was “likely too insignificant to shed light on New  
2 York’s proper-cause standard”).

3 Having defined the conduct at issue as “owning or possessing a firearm without firearm  
4 liability insurance,” the Court finds that Plaintiffs are likely to prevail on a finding that this  
5 conduct is covered by the plain text of the Second Amendment. And, as *Bruen* teaches, the  
6 Constitution thus “presumptively protects that conduct.” 142 S. Ct. at 2130.

7 c. Historical Tradition

8 Because Plaintiffs’ proposed conduct is likely covered by the Second Amendment’s plain  
9 text, the burden shifts to the City to “demonstrate[e] that [the Insurance Requirement] is consistent  
10 with the Nation’s historical tradition of firearm regulation.” *Bruen*, 142 S. Ct at 2130; *see also*  
11 *Gonzales*, 546 U.S. at 429 (“[T]he burdens at the preliminary injunction stage track the burdens at  
12 trial.”). The Court finds that the City has presented a sufficiently “relevantly similar” historical  
13 regulation to defeat Plaintiffs’ likelihood of success on *Bruen*’s historical tradition prong.

14 *Bruen* described the analogical reasoning of the historical tradition prong as “neither a  
15 regulatory straightjacket nor a regulatory blank check. . . . [C]ourts should not ‘uphold every  
16 modern law that remotely resembles a historical analogue’ [but] analogical reasoning requires only  
17 that the government identify a well-established and representative historical *analogue*, not a  
18 historical *twin*.” *Bruen*, 142 S. Ct. at 2133 (emphasis in original). “[E]ven if a modern-day  
19 regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass  
20 constitutional muster.” *Id.* As one example, *Bruen* noted that “[a]lthough the historical record  
21 yields relatively few 18th- and 19th-century ‘sensitive places’ where weapons were altogether  
22 prohibited—e.g., legislative assemblies, polling places, and courthouses—we are also aware of no  
23 disputes regarding the lawfulness of such prohibitions. We therefore can assume it settled that  
24 these locations were ‘sensitive places’ where arms carrying could be prohibited consistent with the  
25 Second Amendment.” *Id.* (internal citation omitted).

26 Here, the City has cited several potential historical analogues with varying degrees of  
27 similarity to the Insurance Requirement. *See* Defs.’ Suppl. Br. 6-7 (citing 18th and 19th century  
28 laws regarding safe gunpowder storage, requiring loyalty oaths as conditions of gun ownership,



1 prohibiting firing guns in certain circumstances, imposing surety bonds, and taxing dangerous  
 2 animals). Several of these are readily distinguishable. For instance, “dangerous animal” laws  
 3 address a different societal problem than the Insurance Requirement, one that was not subject to  
 4 constitutional protection. *See Mitchell v. Williams*, 27 Ind. 62, 62 (1866) (reviewing “an act to  
 5 discourage the keeping of useless and sheep-killing dogs”). Eighteenth century loyalty oaths are  
 6 similarly distinguishable, as the purpose behind those was to “deal with the potential threat  
 7 coming from armed citizens who remained loyal to Great Britain.” Saul Cornell & Nathan  
 8 DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 74 Fordham L.R.  
 9 487, 506 (2004). Gunpowder storage laws had a somewhat analogous purpose to the Ordinance’s,  
 10 in that they were intended to protect communities from accidental fire and explosion. *Id.* at 512.  
 11 However, the regulations themselves were often specific to gunpowder and not easily translatable  
 12 to firearm regulations. *See id.* at 511 (citing regulations that powder must be kept in the “highest  
 13 story of the house” or in “four stone jugs or tin cannisters”).

14 However, the Court finds that the mid-19th century surety statutes, cited by the City and  
 15 discussed at length in *Bruen*, bear striking analogical resemblances to the Insurance Requirement.  
 16 142 S. Ct. at 2148; *see* Defs.’ Suppl. Br. 6. These statutes typically required certain individuals to  
 17 post bond before carrying weapons in public if there was “reasonable cause” to fear these  
 18 individuals would cause injury or breach of the peace, with the bond forfeited if the wielder did in  
 19 fact injure another or breach the peace. *Bruen*, 142 S. Ct. at 2148.

20 As an initial point, the Court notes that the history of reallocating costs of firearm-related  
 21 accidents—from which the Insurance Requirement descends—can be traced back to the early  
 22 American practice of imposing strict liability for such accidents. *See* Brady Br. 8-10. As early as  
 23 1814, the Supreme Judicial Court of Massachusetts noted that “[i]t is immaterial . . . whether the  
 24 act of the defendant [causing a firearm injury] was by his intention and purpose injurious to the  
 25 plaintiff, or the mischief which ensued was accidental,” a legal principle that had “never been  
 26 questioned” at the time. *Cole v. Fisher*, 11 Mass. (1 Tyng) 137, 138 (1814); *see also Moody v.*  
 27 *Ward*, 13 Mass. (1 Tyng) 299, 301 (1816) (noting that militia commanders whose soldiers fire  
 28 “guns in and near the highways on days of military musters . . . are legally responsible for all

1 damage sustained by a citizen in consequence of such neglect.”). Strict liability for gun accidents  
 2 eventually transitioned to a negligence standard in the mid-1800s, which in turn gave rise to  
 3 liability insurance to “insure against the consequences of negligence.” Brady Br. 9-10 (citing  
 4 *Morgan v. Cox*, 22 Mo. 373, 376-77 (1856) (commenting on the transition of firearm strict  
 5 liability to negligence)). However, whether the standard was strict liability or negligence, the  
 6 Nation nonetheless maintained a “historical tradition” of shifting the costs of firearm accidents  
 7 from the victims to the owners of the implicated firearms.

8 With this historical backdrop in mind, the Court considers whether 19th century surety  
 9 statutes are sufficiently analogous to the Insurance Requirement. Both regulations share similar,  
 10 albeit not identical, deterrent purposes: surety laws were “intended merely for prevention” of  
 11 future harm, *Bruen*, 142 S. Ct. at 2149, while the Insurance Requirement is intended to “reduce the  
 12 number of gun incidents by encouraging safer behavior.” Ordinance § 10.32.200(B)(12). Both  
 13 schemes also achieve their purposes through similar means, namely the threat of financial  
 14 consequences (either through a peace bond or higher premiums) for individuals deemed to be  
 15 high-risk (either by a judge or an underwriter). *See Bruen*, 142 S. Ct. at 2151 (“[A]lthough surety  
 16 statutes did not directly restrict public carry, they did provide financial incentives for responsible  
 17 arms carrying.”). The Supreme Court also highlighted the fact that surety laws were not complete  
 18 bans on public carry, much like the Insurance Requirement. *Id.* 2148 (noting that surety laws were  
 19 “not *bans* on public carry”) (italics in original). Accordingly, the Court finds that surety laws and  
 20 the Insurance Requirement share substantial overlap as to the “how and why the regulations  
 21 burden a law-abiding citizen’s right to armed self-defense.” *Bruen*, 142 S. Ct. at 2133.

22 Plaintiffs argue that surety laws are distinguishable because these laws imposed a financial  
 23 burden only *after* “cause has been shown *specific to the individual*.” Pls.’ Suppl. Br. 4 (emphasis  
 24 in original). The Insurance Requirement, they argue, would assume “every person is a danger”  
 25 and apply to all San Jose gun owners, regardless of whether they have shown themselves to be  
 26 high-risk. Pls.’ Suppl. Br. 4-5. This is certainly a fair distinction between surety laws and the  
 27 Insurance Requirement but ultimately one that does not bear upon the metrics identified in *Bruen*.  
 28 142 S. Ct at 2133 (“how and why the regulations burden a law-abiding citizen’s right to armed

self-defense”). First, although the Insurance Requirement applies to all gun owners, the actual amount of the financial burden (*i.e.*, insurance premiums) involves a risk evaluation that *is* tailored to the individual and analogous to “reasonable cause” determinations under surety statutes. *See* Stephen G. Gilles & Nelson Lund, *Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits*, 14 Engage 18 (2013) (“Competitive pressures would lead insurance carriers to keep the premiums for low-risk gun owners low, while charging higher premiums to those who are more likely to cause injuries to other people.”). Second, at this stage in both the litigation and the Ordinance’s implementation, there is no evidence on how low gun liability insurance premiums may be for low-risk gun owners.<sup>5</sup> *But see id.* at 22 n.34 (estimating a baseline premium of about \$20 per year for an average firearm owner). A *de minimis* low-risk premium could retain analogical resemblance to the *de minimis* (but nonetheless discernible) burdens that surety laws imposed on low-risk gun owners in the 19th century. *Cf. Bruen*, 142 S. Ct. at 2149 (acknowledging that “the hypothetical possibility of posting a bond” may be a burden but “the burden these surety statutes may have had on the right to public carry was likely too insignificant”). *Bruen* does not demand a “historical twin,” and neither will this Court.

The Court also notes the *Bruen* Court’s general approval of the regulations attendant to “shall-issue” regimes. *Id.* at 2138 n.9 (noting with approval that “shall-issue” regimes often require licensing applicants to “undergo a background check or pass a firearms safety course”); *see also id.* at 2162 (Kavanaugh, J., concurring) (noting additional “shall issue” requirements such as fingerprinting, mental health records checks, and training in laws regarding the use of force).

Plaintiffs’ proposed conduct can be interpreted to be covered by the Second Amendment’s plain text, but the City has sufficiently demonstrated at this preliminary stage that the Insurance Requirement is likely to be consistent with the Nation’s historical traditions. Although the Insurance Regulation is not a “dead ringer” for 19th century surety laws, the other similarities

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<sup>5</sup> The Insurance Requirement may not even impose any financial burden, as Plaintiffs have not produced any evidence that ordinary homeowners’ and renters’ insurance would not already satisfy the Requirement. *See Brady Br.* 15-16.

1 between the two laws would render the Ordinance “analogous enough to pass constitutional  
2 muster.”<sup>6</sup> *Id.* at 2133.

3 Accordingly, the Court finds that Plaintiffs have not shown a likelihood of success as to  
4 their Second Amendment challenge to the Ordinance’s Insurance Requirement. Furthermore, as  
5 discussed at Section III(A)(ii), Plaintiffs’ Second Amendment challenge to the Ordinance’s Fee  
6 provision is not presently ripe for review, and the Court issues no opinion as to the Fee’s  
7 constitutionality under the Second Amendment.

### 8 **ii. First Amendment**

9 The FAC’s Second Claim for Relief for violations of the First and Fourteenth Amendments  
10 is limited to contesting the Ordinance’s Fee provision and, thus, is not ripe for review. FAC ¶¶  
11 106-115; *see also supra* Section III(A)(i).

### 12 **iii. California State Preemption**

13 In addition to their allegations that the Ordinance violates the U.S. Constitution, Plaintiffs  
14 also assert that the Ordinance is preempted by California general law (Claim 3).

15 Pursuant to article XI, Section 7 of the California Constitution, the City of San Jose may  
16 “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations  
17 *not in conflict with general laws.*” Cal. Const. art. XI, § 7 (emphasis added). The Supreme Court  
18 of California considers a local ordinance to be “in conflict” if it “duplicates, contradicts, or *enters*  
19 *an area fully occupied by general law*, either expressly or by legislative implication.” *O’Connell*  
20 *v. City of Stockton*, 41 Cal. 4th 1061, 1067, 162 P.3d 583, 587 (2007) (emphasis added). “The  
21 party claiming that general state law preempts a local ordinance has the burden of demonstrating  
22 preemption.” *Big Creek Lumber Co. v. Cnty. of Santa Cruz*, 38 Cal. 4th 1139, 1149 (2006), as  
23 \_\_\_\_\_

24 <sup>6</sup> The Court briefly addresses the public comments made by San José Mayor Sam Liccardo  
25 regarding the Ordinance as the first of its kind. *See, e.g.*, FAC ¶ 23; *see also* Mot. 3. To the extent  
26 the mayor’s comments characterize the Ordinance as something different from what the parties  
27 have briefed in this case, the Court accords no weight to those comments. The Court is charged  
28 with reviewing the constitutionality of the Ordinance as drafted, not as described by the mayor.

1 modified (Aug. 30, 2006).

2 Plaintiffs only argue that the Ordinance violates the California Constitution by entering an  
3 “area fully occupied by general law,” rather than duplicating or contradicting state law. Mot. 18.  
4 Because the State of California has already enacted legislation on several topics relating to firearm  
5 regulations—*see* Mot. 18 (citing Cal. Pen. Code sections on firearm safety, appearance, storage,  
6 carrying and possession, sale and transfers, registration, background checks, equipment, etc.)—the  
7 City of San Jose, Plaintiffs argue, is preempted from regulating the field of “residential handgun  
8 possession.” Mot. 18 (citing *Fiscal v. City & Cnty. of San Francisco*, 158 Cal. App. 4th 895, 909  
9 (2008)). Here, Plaintiffs have largely focused on Cal. Pen. Code § 25605 and Cal. Gov. Code §  
10 53071 as evidence of the California Legislature’s intent, as well as *Fiscal*, 158 Cal. App. 4th 895.

11 The City acknowledges that the State of California has occupied some areas of gun  
12 regulation but disputes that the entire field of gun regulation has been preempted. Opp. 17-18  
13 (citing *Great W. Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal. 4th 853, 861 (2002) (“A review of  
14 the gun law preemption cases indicates that the Legislature has preempted discrete areas of gun  
15 regulation rather than the entire field of gun control.”)). The City also argues that *Fiscal*’s remark  
16 that California has preempted the entire field of “residential handgun possession” is non-  
17 controlling dicta, as the San Francisco ordinance in *Fiscal* involved a near total handgun ban.  
18 Opp. 18-19 (citing *Fiscal*, 158 Cal. App. 4th at 915, 919). Finally, the City argues that the specific  
19 language of the allegedly preempting California statutes’ only extends to permitting and  
20 registration requirements. Opp. 19 (citing Cal. Pen. Code § 25605; Cal. Gov. Code § 53071).<sup>7</sup>

21 The Court first considers whether Plaintiffs’ cited statutes evidence an “express  
22 manifest[ation]” of the California Legislature’s intent to occupy the field to the exclusion of the  
23 City’s Ordinance. Here, Penal Code § 25605 does not purport to advance legislative intent of any

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24  
25 <sup>7</sup> The City does not raise (nor can it) any ripeness challenge specific to Plaintiffs’ preemption  
26 claim, as the key preemption issue is “primarily legal and does not require substantial further  
27 factual development,” such as the subsequent promulgation of the City Manager’s regulations.  
28 *Wolfson*, 616 F.3d at 1060.

1 kind, a conclusion *Fiscal* implicitly acknowledged. 158 Cal. App. 4th at 908 (“[W]e *infer* from  
2 [Section 25605] that the Legislature intended to occupy the field of residential handgun  
3 possession.”) (emphasis added). The Government Code § 53071, on the other hand, does contain  
4 an express manifestation of intent; however, its language is explicitly limited to “the intention of  
5 the Legislature to occupy the whole field of *regulation of the registration or licensing* of  
6 commercially manufactured firearms.” Cal. Gov. Code § 53071 (emphasis added). Although  
7 these statutes may manifest an intent to occupy the field of firearm permitting and registration,  
8 neither can be fairly read to contain a legislative intent to occupy the *entire* field of gun regulation.  
9 Nor can the Ordinance’s insurance and fee regulations be transmuted into a permitting scheme to  
10 fall within this intent, as violations do not imperil one’s possession of a firearm. Ordinance §  
11 10.32.240; *see also* Opp. 3.

12 Having determined that Plaintiffs’ cited statutes do not expressly preempt the Ordinance,  
13 the Court proceeds to the issue of whether the California Legislature has nonetheless *implicitly*  
14 occupied the field. In *Great Western Shows*, the California Supreme Court surveyed the body of  
15 California gun law preemption cases and concluded that “the Legislature has chosen not to broadly  
16 preempt local control of firearms but has targeted certain specific areas for preemption.” 27 Cal.  
17 4th at 861-64; *see also Am. Fin. Servs. Assn. v. City of Oakland*, 34 Cal. 4th 1239, 1255 (2005)  
18 (remarking that “rather than intending to deprive municipalities of their police power to regulate  
19 handgun sales, [the Legislature] has been cautious about depriving local municipalities of aspects  
20 of their constitutional police power to deal with local conditions.”); *Calguns Found., Inc. v. Cnty.*  
21 *of San Mateo*, 218 Cal. App. 4th 661, 676 (2013) (“[T]he cases uniformly construe state regulation  
22 of firearms narrowly, finding no preemption of areas not specifically addressed by state law.”).

23 Plaintiffs’ reliance on *Fiscal* to establish preemption is misplaced for multiple reasons.  
24 Where the California Supreme Court has not squarely addressed an issue of California law, this  
25 Court must predict how the state high court would decide the issue using, *inter alia*, intermediate  
26 appellate court decisions. *See All. for Prop. Rts. & Fiscal Resp. v. City of Idaho Falls*, 742 F.3d  
27 1100, 1102 (9th Cir. 2013) (“When the state’s highest court has not squarely addressed an issue,  
28 we must predict how the highest state court would decide the issue using intermediate appellate

1 court decisions. . .”). Here, not only has it not squarely addressed the issue of *Fiscal*’s scope of  
 2 California gun law preemption, the California Supreme Court had remarked in *Great Western*  
 3 *Shows* that the “Legislature has chosen not to broadly preempt local control of firearms but has  
 4 targeted certain specific areas for preemption.” 27 Cal. 4th at 864. Furthermore, another Court of  
 5 Appeal had addressed *Fiscal* at length and expressly declined to construe Government Code §  
 6 53071 as a broad “expression of intent to occupy the whole field of firearm regulation.” *Calguns*,  
 7 218 Cal. App. 4th at 673-74, 677 (limiting *Fiscal* to its facts and the “extreme breadth of the  
 8 ordinance being challenged [in *Fiscal*]”). Given the absence of the final word from the state high  
 9 court and the lack of uniformity among the intermediate state appellate courts on the scope of  
 10 preemption Plaintiffs advance, this Court is not persuaded that the California Supreme Court  
 11 would interpret Penal Code § 25605 and Government Code § 53071 to occupy the entire field of  
 12 “residential handgun possession.”

13 Furthermore, even if the Court were to adopt *Fiscal*’s implied preemptive scope of all  
 14 “residential handgun possession,” Plaintiffs have not established that the Ordinance’s provisions  
 15 would fall within that field of preemption, *i.e.*, that the Insurance and Fee provisions necessarily  
 16 implicate handgun possession. In *Fiscal*, the challenged ordinance purported to (1) prohibit the  
 17 sale and transfers of all firearms without exception and (2) limit handgun possession to  
 18 governmental and professional purposes with an option for residents to surrender their handguns  
 19 to law enforcement. *Fiscal*, 158 Cal. App. 4th at 901. Accordingly, the ordinance in *Fiscal*, by its  
 20 own language, directly implicated the possession of handguns.<sup>8</sup> *Id.* (“Section 3 is entitled  
 21 ‘Limiting Handgun Possession in the City and County of San Francisco.’”). By contrast, there is  
 22 no operation of San Jose’s Ordinance that would result in a firearm being removed from its  
 23

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24 <sup>8</sup> At the hearing, Plaintiffs argued that *Fiscal* should be interpreted to preempt any ordinance that  
 25 merely *impacts* residents possessing guns. However, this unrestricted interpretation would in  
 26 effect preempt *all* local gun regulation, a result expressly rejected by *Fiscal* itself. 158 Cal. App.  
 27 4th at 905 (“[T]he Legislature has never expressed an intent to preempt the entire field of firearm  
 28 regulation to the exclusion of local control.”).



owner's possession. Opp. 3. Without a means by which possession could be revoked, the Court does not consider the Ordinance to be entering the field of residential handgun *possession*.

Given the state high court's interpretation on state gun law preemption, the Court holds that Plaintiffs are not likely to succeed on their claim that the California Legislature has impliedly preempted the Ordinance's Insurance and Fee Provisions.

#### iv. California Tax Requirement

Plaintiffs also argue that, under the California Constitution, the Ordinance's provisions are treated as taxes (Claim 4) and, therefore, should have been submitted to the voters for approval.

Specifically, the California Constitution article XIII C prohibits local governments from imposing, extending, or increasing any general tax unless that tax is approved by a majority vote to the electorate. Cal. Const. art. XIII C, § 2(b). A "tax" is defined as "any levy, charge, or exaction of any kind imposed by a local government," subject to certain exceptions for charges that do not exceed the "reasonable costs to the local government" of providing a service or benefit. Cal. Const. art. XIII C, § 1(e). Notably, article XIII C "does not expressly require that any levy, charge or exaction must be payable to a local government" to qualify as a tax. *Schmeer v. Cnty. of Los Angeles*, 213 Cal. App. 4th 1310, 1326 (2013), as modified (Mar. 11, 2013) (internal quotation marks omitted).

Plaintiffs argue that both the Insurance Requirement and the Fee are taxes that were not "submitted to the electorate and approved by a majority vote," as required by the California Constitution. Mot. 19 (quoting Cal. Const. art. XIII C, § 2(b)). The required insurance and Fee, Plaintiffs assert, do not fall under any exception to the definition of a "tax" because none of the charges purport to pay for government activities and, therefore, by definition "exceed the reasonable costs to the local government." Mot. 19-20; *see also* Cal. Const., art. XIII C, § 1(e).

The City responds that neither the required insurance nor the Fee can qualify as a tax, because California courts have interpreted the California Constitution's voter approval requirement to apply to a fee only if the resulting proceeds would pass into government hands. Opp. 19-20 (citing *Schmeer*, 213 Cal. App. 4th at 1326-29). The City also argues that, alternatively, both the required insurance and the Fee would qualify for an exception to the voter

1 approval requirement because they confer a “specific benefit” directly to the payor and not  
2 conferred on those not charged. Opp. 20 (citing Cal. Const., art. XIII C, § 1).

3 Because the question of whether fees not payable to the government are considered taxes is  
4 a legal question of state constitutional interpretation and does not rely on further factual  
5 development, it would be ripe for review. *See Wolfson*, 616 F.3d at 1060. On this particular  
6 question of state law, *Schmeer* is the only California appellate court opinion on point. In *Schmeer*,  
7 a Los Angeles ordinance required that all retail stores provide only recyclable or reusable bags for  
8 their customers’ use, and all retail customers must pay 10 cents to the retail store for each  
9 recyclable bag used. *Schmeer*, 213 Cal. App. 4th at 1314. The collected proceeds were retained  
10 by the store and could only be used for the store’s costs of compliance, the recyclable bags, and  
11 any educational materials promoting the use of reusable bags. *Id.* After conducting a lengthy  
12 interpretative analysis on whether a government-imposed fee that was not payable or remitted to  
13 the government would qualify as a “tax,” the *Schmeer* court concluded that the California  
14 Constitution’s voter approval requirements were “limited to charges payable to, or for the benefit  
15 of, a local government.” *Schmeer*, 213 Cal. App. 4th at 1326-31 (emphasis added); *see also*  
16 *Howard Jarvis Taxpayers Ass’n v. Bay Area Toll Auth.*, 51 Cal. App. 5th 435, 453 (2020)  
17 (distinguishing *Schmeer* on the basis that the toll increases at issue were remitted to a  
18 governmental entity), reh’g denied (July 13, 2020).

19 Although the Ordinance’s Insurance Requirement and Fee are imposed by the City in an  
20 admittedly different context from a retail bag fee, *Schmeer*’s analysis nonetheless provides useful  
21 guidance for this Court to predict how the California Supreme Court may consider the issue. For  
22 instance, *Schmeer* found that “[t]axes ordinarily are imposed to raise revenue for the government.”  
23 *Schmeer*, 213 Cal. App. 4th at 1326 (citing *California Farm v. State Water Res. Control Bd.*, 51  
24 Cal. 4th 421, 437 (2011), as modified (Apr. 20, 2011); *Sinclair Paint Co. v. State Bd. of*  
25 *Equalization*, 15 Cal. 4th 866, 874 (1997)). Here, no provision of the Ordinance would generate  
26 revenue for the City, as insurance premiums are paid to insurance companies and the Fee is paid  
27  
28

1 directly to the Nonprofit.<sup>9</sup> The *Schmeer* opinion also independently addressed Plaintiffs’  
 2 argument that—because the City would not be engaged in any activity under the Ordinance—the  
 3 Ordinance’s charges would necessarily exceed “reasonable costs of the government activity”.  
 4 Mot. 19 (quoting Cal. Const., art. XIII C, § 1). However, rather than adopting a tautological  
 5 interpretation of article XIII C’s exceptions, *Schmeer* considered the exceptions’ reference to costs  
 6 of *government activity* as support that the exceptions “do not contemplate the situation where a  
 7 charge is paid to an entity or person other than a local government or where such an entity or  
 8 person incurs reasonable costs.” *Schmeer*, 213 Cal. App. 4th at 1327. This analysis, though  
 9 applied in the context of a retail bag fee, nonetheless translates effectively to assist the Court’s  
 10 present analysis of the California Constitution.

11 In any event, Plaintiffs do not offer a conflicting or alternative interpretation of article XIII  
 12 C other than noting the California Constitution does not define a “tax” by where the funds are  
 13 deposited. Reply 11. This response, however, simply disagrees with *Schmeer*’s interpretation and  
 14 holding without providing supporting authority to the contrary. Plaintiffs’ citation to *Nat’l Fed’n*  
 15 *of Indep. Bus. v. Sebelius* is inapposite, as article XIII C in the California Constitution bears no  
 16 similarity to and need not be interpreted consistently with the Taxing Clause in the U.S.  
 17 Constitution. See Mot. 19; Reply 11 (citing *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519,  
 18 564-66 (2012)).

19 Plaintiffs also note that *Schmeer* held that article XIII C’s voter approval requirements  
 20 apply to “charges payable to, or for the benefit of, a local government.” Reply 11 (emphasis in  
 21 original) (quoting *Schmeer*, 213 Cal. App. 4th at 1328-29). Accordingly, “[i]f, as Defendants have  
 22 argued elsewhere, the Ordinance benefits San Jose, article XIII C applies.” Reply 11. This  
 23 interpretation, however, conflates a benefit to the local government with a benefit to the public at  
 24 large. There is little dispute that the Ordinance is intended to provide a benefit to the *public*—

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25  
 26 <sup>9</sup> Section 10.32.250 of the Ordinance does permit the City Manager to charge and collect “cost  
 27 recovery fees associated with fulfilling” the Ordinance directives, but Plaintiffs do not challenge  
 28 this portion of the Ordinance.

1 indeed, one would hope and expect that everything the City of San Jose enacts (tax or no tax) is  
2 for the public benefit of its citizenry. Ordinance § 10.32.200. However, *Schmeer*’s “for the  
3 benefit of” language only contemplated benefits inuring to the *local government* itself, such as a  
4 “charge payable to a third party creditor to extinguish a debt owed by a local government.”  
5 *Schmeer*, 213 Cal. App. 4th at 1329 n.7. Additionally, given that the Los Angeles bag fee was  
6 almost certainly a charge intended to provide public environmental benefits, *Schmeer* could not  
7 have intended that article XIII C’s voter approval requirement applied to every charge for the  
8 *public*’s benefit. *See id.* at 1314.

9 Because the Ordinance’s Insurance Requirement and Fee are not payable to the City and  
10 do not provide a specific benefit to the City itself, the Court is persuaded by *Schmeer*’s  
11 interpretation that such charges are not a “tax” requiring voter approval and, therefore, does not  
12 reach the City’s alternate argument invoking the “specific benefits” exception to article XIII C.  
13 Opp. 20. Accordingly, Plaintiffs have not shown that they are likely to succeed on their claim that  
14 the Ordinance violates article XIII C of the California Constitution.

15 **v. San Jose City Charter**

16 Finally, Plaintiffs argue that the Ordinance’s Fee provisions violate San Jose’s City Charter  
17 (Claim 5). Mot. 20-21. They argue that, because the Fee is paid directly to the Nonprofit, the  
18 Ordinance violates the City Charter’s requirement for all “revenues and receipts” to be placed in a  
19 special fund or the General Fund. *Id.* at 21 (citing City Charter § 1211). The Ordinance also  
20 allegedly violates the delegation of budgeting and appropriation powers to the City Council by  
21 prohibiting City Council from directing how the Fee proceeds are expended. *Id.* (citing City  
22 Charter §§ 1204, 1206-07). The same prohibition, Plaintiffs argue, violates the delegation of  
23 executive functions to the City Manager. *Id.* at 20-21 (citing City Charter §§ 502, 701).

24 The City responds that most of the cited City Charter provisions do not apply to the Fee  
25 because it is not “paid into the City Treasury” and does not pay for any City operations. Opp. 21-  
26 22 (citing City Charter §§ 1204, 1206, 1207, 1211). Additionally, the City asserts that the  
27 Ordinance properly confers on the City Manager administrative oversight and audit authority over  
28 how the Nonprofit expends the Fee’s proceeds. Opp. 22 (citing Ordinance § 10.32.235).

1 As an initial point, although Plaintiffs' claims relating to the City Charter's "revenues and  
2 receipts," budgeting, and appropriation sections primarily present legal and interpretative  
3 questions and are likely ripe, Plaintiffs' claim regarding the City Manager's executive and  
4 administrative functions would likely "require further factual development." *See* Ordinance §  
5 10.32.235(A); *see also* *Wolfson*, 616 F.3d at 1060. At this stage of the proceedings, the Court will  
6 review Plaintiffs' City Charter challenges to the extent they do not rely on subsequent regulations  
7 and yet-to-be-determined facts—however, the Court's discussion is correspondingly and  
8 necessarily limited to the Ordinance's broad outline of the Fee structure and implementation.

9 The Court first addresses Plaintiffs' argument that payment of the Fee to the Nonprofit  
10 violates § 1211 of the City Charter, which reads in its entirety:

11 All monies paid into the City Treasury shall be credited to and kept in separate  
12 funds in accordance with provisions of this Charter or ordinance. A fund, to be  
13 known as the "General Fund," is hereby created as a medium of control and  
14 accounting for all City activities excepting activities for which special funds are  
established and maintained. All revenues and receipts which are not required by  
this Charter, State law or ordinances to be placed in special funds shall be credited  
to the General Fund.

15 City Charter § 1211. This section addresses two potentially overlapping categories of funds: "All  
16 monies paid into the City Treasury" and "All revenues and receipts." The Ordinance, however,  
17 directs "every dollar generated" from the Fee to be spent by the Nonprofit and used exclusively for  
18 the Nonprofit's programs and initiatives. Ordinance § 10.32.220(C). Accordingly, because the  
19 Fee is neither "paid into the City Treasury" nor is it received by the City as revenue, Plaintiffs  
20 have not shown likelihood of success in proving that the Fee's proceeds would fall under § 1211  
21 of the City Charter. *See also supra* Section III(B)(iv).

22 Plaintiffs' claims that the Ordinance violates the City Charter's budgeting and  
23 appropriations provisions rely on a similarly faulty premise, namely that the Nonprofit's  
24 operations are City activities. Mot. 20. Plaintiffs are correct that the City Council retains the  
25 power to adopt a budget, *see* City Charter § 1206; however, the City Charter defines the budget as  
26 "a complete financial plan of *all City funds and activities*." *Id.* § 1205 (emphasis added). Because  
27 the Fee's proceeds are not "revenues or receipts" and the Nonprofit is not a City department or  
28 entity, the Nonprofit's funds and operations would not fall under the City's budgeting obligations.

1 For the same reason, Plaintiffs have not shown likelihood of success in proving that the  
2 Nonprofit's expenditures are subject to the City Charter's appropriations section, which delegates  
3 to the City Council the authority to "appropriate monies for the operation of *each of the offices,*  
4 *departments and agencies of the City.*" *Id.* § 1207 (emphasis added). Especially as Plaintiffs  
5 themselves have asserted the Fee does not pay for government activity, *see* Mot. 19, the  
6 Nonprofit's operations and expenditures cannot be reasonably interpreted to violate the City  
7 Charter's budgeting and appropriation sections.

8 Finally, Plaintiffs argue that, by permitting the City to direct fees to a non-governmental  
9 entity whose expenditures are expressly insulated from City control, the Ordinance undermines the  
10 City Manager's responsibility for the "faithful execution of all laws," as well as the purpose of the  
11 General Fund as a medium of control on "the City government's ability to hide, or avoid oversight  
12 of, how City fee revenues are spent." Reply 12-13 (citing City Charter §§ 701(d), 1211).

13 However, the Ordinance authorizes the City Manager to "promulgate all regulations necessary to  
14 implement" the Ordinance, including any guidelines for and auditing how the Nonprofit expends  
15 its funds. Ordinance § 10.32.235. As a result, the fact that the City may not specifically direct the  
16 Nonprofit's activities does not *necessarily* violate the City Charter § 701 or abdicate the City  
17 Manager's executive and administrative functions. That said, as the Court noted, the City's  
18 involvement with the Fee is difficult to assess in the abstract. Plaintiffs may revisit this issue once  
19 the City Manager promulgates the relevant implementing regulations, but for purposes of this  
20 motion, Plaintiffs have not met their burden.

21 In summary, Plaintiffs' City Charter claims rely on the mistaken premises that the Fee is  
22 characterized as City revenue and the Nonprofit is included in the City budget, neither of which is  
23 supported by the City Charter's text or the Ordinance's language. *See* Reply 11-12 (referring to  
24 the Fee as "revenue"). Furthermore, Plaintiffs' claim regarding the City Manager's authority and  
25 oversight over the Nonprofit would turn on the actual regulations promulgated by the City  
26 Manager. Accordingly, the Court finds that Plaintiffs have not shown that they are likely to  
27 succeed on the merits of their City Charter challenges.

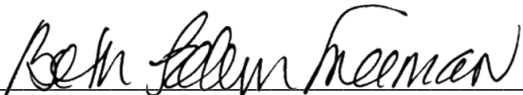
28 Because the Court finds that Plaintiffs have not established that they are likely to succeed

on the merits on their Second Amendment, California Constitution, and City Charter claims, it does not reach the remaining *Winter* factors. *See* 555 U.S. at 20.

**IV. ORDER**

For the foregoing reasons, IT IS HEREBY ORDERED that Plaintiffs' motion for a preliminary injunction to restrain and enjoin Defendants from enforcing any provision of the Ordinance is DENIED.

Dated: August 3, 2022

  
BETH LABSON FREEMAN  
United States District Judge

United States District Court  
Northern District of California



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9

10  
11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN JOSE DIVISION**  
14

15 **NATIONAL ASSOCIATION FOR GUN**  
16 **RIGHTS, INC.**, a non-profit corporation, and  
**MARK SIKES**, an individual,

17 Plaintiffs,

18 v.

19 **CITY OF SAN JOSE**, a public entity,  
20 **JENNIFER MAGUIRE**, in her official  
21 capacity as City Manager of the City of San  
22 Jose, and the **CITY OF SAN JOSE CITY**  
**COUNCIL**,

23 Defendants.  
24  
25  
26  
27

Case No. 5:22-cv-00501-BLF

**[PROPOSED] ORDER GRANTING  
ADMINISTRATIVE MOTION TO  
CONSIDER WHETHER CASES  
SHOULD BE RELATED UNDER CIVIL  
LOCAL RULES 3-12 AND 7-11**

1 Having considered the Defendant City of San Jose's administrative motion to consider whether  
2 cases should be related pursuant to Civil Local Rules 3-12 and 7-11, all papers filed in support of or  
3 opposition to the motion, and the entire record herein, the Court hereby:

4 **ORDERS**, that *Howard Jarvis Taxpayers Association, et al. v. City of San Jose*, Case No. 5:22-  
5 cv-02365-NC, is related to *National Association for Gun Rights, Inc., et al. v. City of San Jose, et al.*,  
6 Case No. 5:22-cv-00501-BLF. Pursuant to Civil Local Rule 3-12(f)(3), the Clerk shall reassign the above  
7 case to the undersigned judge for all future purposes.

8 **FURTHER ORDERS**, that the parties are instructed that all future filings in any reassigned case  
9 are to bear the initials of the newly assigned judge immediately after the case number. Any case  
10 management conference in any reassigned case will be rescheduled by the Court. The parties shall adjust  
11 the dates for the conference, disclosures, and report required by Fed. R. Civ. P. 16 and 26 accordingly.  
12 Unless otherwise ordered, any upcoming dates for hearing noticed motions in the re-assigned case are  
13 vacated and must be re-noticed by the moving party before the newly assigned judge; any deadlines set  
14 by the ADR Local Rules remain in effect.

15 **IT IS SO ORDERED.**

16  
17 Dated: April 20, 2022

  
HON. BETH LABSON FREEMAN  
UNITED STATES DISTRICT COURT JUDGE

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16 **UNITED STATES DISTRICT COURT**  
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
18 **SAN JOSE DIVISION**

19 **NATIONAL ASSOCIATION FOR GUN**  
20 **RIGHTS, INC.**, a non-profit corporation, and  
21 **MARK SIKES**, an individual,

22 Plaintiffs,

23 **v.**

24 **CITY OF SAN JOSE**, a public entity,  
25 **JENNIFER MAGUIRE**, in her official capacity  
26 as City Manager of the City of San Jose, and the  
27 **CITY OF SAN JOSE CITY COUNCIL**,

28 Defendants.

Case No. 5:22-cv-00501-BLF

**ADMINISTRATIVE MOTION TO  
CONSIDER WHETHER CASES  
SHOULD BE RELATED UNDER CIVIL  
LOCAL RULES 3-12 AND 7-11**

Pursuant to Civil Local Rules 3-12(b) and 7-11, Defendant City of San Jose (“City”) files this Administrative Motion to Consider Whether Cases Should Be Related. The City submits that the action entitled *Howard Jarvis Taxpayers Association, et al. v. City of San Jose*, Case No. 5:22-cv-02365-NC (“*HJTA*”) (Notice of Removal filed April 15, 2022) is related to the instant action, *National Association for Gun Rights, Inc., et al. v. City of San Jose, et al.* (“*NAGR*”), Case No. 5:22-cv-00501-BLF (Complaint filed January 25, 2022). *See* Decl. of Tamarah P. Prevost (“Prevost Decl.”), Ex. 1 (copy of the operative First Amended Complaint in the *NAGR* action); *id.*, Ex. 2 (copy of the Notice of Removal in the *HJTA* action, which includes a copy of the underlying complaint).

Civil Local Rule 3-12(a) provides that an action is related to another when: “(1) The allegations concern substantially the same parties, property, transaction or event; and (2) It appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges.” These criteria are met here. The two actions involve substantially the same parties (i.e., the City is the lead defendant in both actions), as well as the same transaction or events. Specifically, the plaintiffs in both the above-referenced actions similarly bring a pre-enforcement challenge to the same firearm-related San Jose ordinance, San Jose Municipal Code Section 10.32.200 *et seq.* (“Ordinance”), under the First, Second, and Fourteenth Amendments to the U.S. Constitution, Article XIII C § 1 of the California Constitution, and other state laws.

Given that both actions concern substantially the same parties, the same Ordinance, and substantially the same legal arguments and claims, there will be an unduly burdensome duplication of labor and expense, judicial resources, and potentially inconsistent results, if the two actions were to be conducted before different Judges. Accordingly, relating the *HJTA* and *NAGR* actions will serve the interests of judicial economy and avoid the potential for conflicting results, consistent with Civil Local Rules 3-12(a). Plaintiffs in the *NAGR* action do not dispute, and have agreed to stipulate, that these cases are related. Counsel for *HJTA* “decline [Defendants’] invitation to stipulate” that the two cases should be related. Prevost Decl. ¶ 4.

For these reasons, San Jose respectfully requests that this Court enter an order relating *Howard Jarvis Taxpayers Association, et al. v. City of San Jose*, Case No. 5:22-cv-02365-NC, with *National Association for Gun Rights, Inc., et al. v. City of San Jose, et al.*, Case No. 5:22-cv-00501-BLF.

Dated: April 19, 2022

Respectfully submitted,

**COTCHETT, PITRE & McCARTHY, LLP**

By: /s/ Tamarah P. Prevost

Joseph W. Cotchett

Tamarah P. Prevost

Andrew F. Kirtley

Melissa Montenegro

*Attorneys for Defendant City of San Jose*

**CERTIFICATE OF SERVICE**

I am employed in San Mateo County, California, and I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Cotchett, Pitre & McCarthy, LLP, 840 Malcolm Road, Burlingame, California, 94010. On this day, I served the following document(s) in the manner described below:

**ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASE SHOULD  
BE RELATED PURSUANT TO CIVIL LOCAL RULES 3-12 AND 7-11**

✓ **BY MAIL:** I am readily familiar with this firm's practice for collection and processing of correspondence for mailing. Following that practice, I placed a true copy of the aforementioned document(s) in a sealed envelope, addressed to each addressee, respectively, as specified below. The envelope was placed in the mail at my business address, with postage thereon fully prepaid, for deposit with the United States Postal Service on that same day in the ordinary course of business.

✓ **BY E-MAIL:** My e-mail address is kdelia@cpmlegal.com and service of this document(s) occurred on the date shown below. This document is being served electronically and the transmission was reported as complete and without error.

Harmeet K. Dhillon Michael A. Columbo Mark P.Meuser <b>Dhillon Law Group Inc.</b> 177 Post Street, Suite 700 San Francisco, CA 94108 Telephone: (415) 433-1700 harmeet@dhillonlaw.com mcolumbo@dhillonlaw.com mmeuser@dhillonlaw.com	Attorneys for Plaintiffs: National Association for Gun Rights, Inc., and Mark Sikes (NAGR Action, Case No. 5:22-cv-00501-BLF)
David A. Warrington Curtis M. Schube <b>Dhillon Law Group Inc.</b> 2121 Eisenhower Avenue, Suite 402 Alexandria, VA 22314 Telephone: (571) 400-2121 dwarrington@dhillonlaw.com cschube@dhillonlaw.com	

Jonathan M. Coupal Timothy A. Bittle Laura E. Dougherty <b>Howard Jarvis Taxpayers Foundation</b> 921 Eleventh Street, Suite 1201 Sacramento, CA 95814 Telephone: (916) 444-9950 Email: tim@hjta.org	Attorneys for Plaintiffs: Howard Jarvis Taxpayers Association; Silicon Valley Taxpayers Association; Silicon Valley Public Accountability Foundation; James Barry; and George Arrington ( <i>HJTA</i> Action, Case No. 5:22-cv-02365-NC)
---	---

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Burlingame, California, on April 19, 2022.

/s/ Kathleen D'Elia

Kathleen D'Elia



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15 *Attorneys for Defendants*

16 **UNITED STATES DISTRICT COURT**  
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
18 **SAN JOSE DIVISION**

19 **NATIONAL ASSOCIATION FOR GUN**  
20 **RIGHTS, INC.**, a non-profit corporation, and  
21 **MARK SIKES**, an individual,

22 Plaintiffs,

23 v.

24 **CITY OF SAN JOSE**, a public entity,  
25 **JENNIFER MAGUIRE**, in her official  
26 capacity as City Manager of the City of San  
27 Jose, and the **CITY OF SAN JOSE CITY**  
28 **COUNCIL**,

Defendants.

Case No. 5:22-cv-00501-BLF

**DECLARATION OF TAMARAH P.  
PREVOST IN SUPPORT OF  
ADMINISTRATIVE MOTION TO  
CONSIDER WHETHER CASES SHOULD  
BE RELATED UNDER CIVIL LOCAL  
RULES 3-12 AND 7-11**

1 I, Tamarah P. Prevost, hereby declare as follows:

2 1. I am an attorney duly admitted to practice in the State of California and before this Court.  
3 I am a partner with the law firm Cotchett, Pitre & McCarthy, LLP, attorneys for Defendant City of San  
4 Jose ("City") in *Howard Jarvis Taxpayers Association, et al. v. City of San Jose*, Case No. 5:22-cv-  
5 02365-NC ("*HJTA*") (Notice of Removal filed April 15, 2022), and in *National Association for Gun*  
6 *Rights, Inc., et al. v. City of San Jose, et al.* ("*NAGR*"), Case No. 5:22-cv-00501-BLF (Complaint filed  
7 January 25, 2022). Pursuant to Civil Local Rule 7-11, I submit this declaration in support of the City's  
8 Administrative Motion to Consider Whether Cases Should Be Related Under Civil Local Rules 3-12 and  
9 7-11 ("Motion"). If called as a witness, I could and would testify competently to the matters stated herein.

10 2. Attached here as **Exhibit 1** is a true and correct copy of the operative First Amended  
11 Complaint (excluding exhibits), filed on February 14, 2022, in the *NAGR* action. ECF 19.

12 3. Attached here as **Exhibit 2** is a true and correct copy of the Notice of Removal in the  
13 *HJTA* action, filed on April 15, 2022, which includes a copy of the underlying complaint filed in Santa  
14 Clara County Superior Court on March 7, 2022. ECF 1.

15 4. On April 18, 2022, I conferred by email with plaintiffs' counsel in the *NAGR* and *HJTA*  
16 actions. Counsel in *NAGR* does not oppose relation. Counsel in *HJTA* did not agree to stipulate that the  
17 *HJTA* and *NAGR* cases should be related.

18 I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day  
19 of April 2022 at Burlingame, California.

20 /s/ Tamarah P. Prevost  
21 TAMARAH P. PREVOST  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I am employed in San Mateo County, California, and I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Cotchett, Pitre & McCarthy, LLP, 840 Malcolm Road, Burlingame, California, 94010. On this day, I served the following document(s) in the manner described below:

**DECLARATION OF TAMARAH P. PREVOST IN SUPPORT OF ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED UNDER CIVIL LOCAL RULES 3-12 AND 7-11**

✓ **BY MAIL:** I am familiar with this firm's practice for collection and processing of correspondence for mailing. Following that practice, I placed a true copy of the aforementioned document(s) in a sealed envelope, addressed to each addressee, respectively, as specified below. The envelope was placed in the mail at my business address, with postage thereon fully prepaid, for deposit with the United States Postal Service on that same day in the ordinary course of business.

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Jonathan M. Coupal Timothy A. Bittle Laura E. Dougherty <b>Howard Jarvis Taxpayers  Foundation</b> 921 Eleventh Street, Suite 1201 Sacramento, CA 95814 Telephone: (916) 444-9950 Email: tim@hjta.org	Attorneys for Plaintiffs: Howard Jarvis Taxpayers Association; Silicon Valley Taxpayers Association; Silicon Valley Public Accountability Foundation; James Barry; and George Arrington ( <i>HJTA</i> Action, Case No. 5:22-cv-02365-NC)
--	---

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Burlingame, California, on April 19, 2022.

/s/ Kathleen D'Elia

Kathleen D'Elia

# **Exhibit 1**

Case 5:22-cv-00501-BLF Document 49-2 Filed 02/14/22 Page 1 of 23

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**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

**NATIONAL ASSOCIATION FOR GUN  
RIGHTS, INC.**, a nonprofit corporation, and  
**MARK SIKES**, an individual,

Plaintiffs,

v.

**CITY OF SAN JOSE, a public entity,**  
**JENNIFER MAGUIRE**, in her official capacity  
as City Manager of the City of San Jose, and the  
**CITY OF SAN JOSE CITY COUNCIL**,

Defendants.

Case Number: 5:22-cv-00501-BLF

**FIRST AMENDED COMPLAINT FOR  
INJUNCTIVE RELIEF, DECLARATORY  
JUDGMENT, AND NOMINAL DAMAGES**

Judge: Hon. Beth Labson Freeman



First Amended Complaint

No: 5:22-cv-00501-BLF

**SER-081**

1 “That the power to tax involves the power to destroy; that the power to destroy may defeat and  
 2 render useless the power to create....” Justice John Marshall, *M’Culloch v. Maryland*, 17 U.S. 316,  
 3 431 (1819). “A tax that burdens rights protected by the [Constitution] cannot stand unless the burden  
 4 is necessary to achieve an overriding governmental interest.” Justice Sandra Day O’Connor,  
 5 *Minneapolis Star and Tribune Co. v. Minnesota Comm’r of Rev.*, 460 U.S. 575, 582 (1983).

6 Plaintiffs National Association for Gun Rights, Inc. (“NAGR”), and Mark Sikes (“Sikes”), by  
 7 and through the undersigned counsel, hereby bring this action for injunctive relief, a declaratory  
 8 judgment, and nominal damages as a result of the City of San Jose’s unconstitutional and unlawful  
 9 ordinance, specifically Part 6 of Chapter 10.32 of Title 10 of the San Jose Municipal Code (the  
 10 “Ordinance”). In support of these requests, Plaintiffs state as follows:

### 11 INTRODUCTION

12 1. The Second Amendment “guarantee[s] the individual right to possess and carry  
 13 weapons in case of confrontation,” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), and the  
 14 government “may not impose a charge for the enjoyment of a right granted by the federal  
 15 constitution.” *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). And yet, the City of San Jose has  
 16 taken the unprecedented step of requiring virtually all gun owners within its city limits to pay  
 17 unspecified sums of money to private insurance companies and an unspecified fee to an unidentified  
 18 government-chosen nonprofit simply to exercise their constitutional right to own a gun, as well as an  
 19 unspecified fee to the City for the costs of administering the unlawful Ordinance. Just as a tax on the  
 20 fundamental right for the press to circulate its content “suggests that the goal of the regulation is not  
 21 unrelated to suppression of expression,” *Minneapolis Star and Tribune Co. v. Minnesota Comm’r of*  
 22 *Rev.*, 460 U.S. 575, 586 (1983), San Jose’s imposition of a tax, fee, or other arbitrary cost on gun  
 23 ownership is intended to suppress gun ownership without furthering any government interest. In fact,  
 24 the stated penalties for nonpayment of the insurance and fees include seizure of the citizen’s gun. The  
 25 Ordinance is, therefore, patently unconstitutional.

26 2. Moreover, it is at home “where the need for defense of self, family, and property is  
 27 most acute.” *Heller*, 554 U.S. at 628. Because California and the City of San Jose have already made  
 28 it exceedingly difficult to lawfully carry a weapon outside the home, and the Ordinance only affects



1 owners of lawfully owned guns, the Ordinance’s true impact is solely on guns kept in the home by  
2 law-abiding citizens. If left intact, the City of San Jose’s Ordinance would strike at the very core of  
3 the fundamental constitutional right to keep and bear arms and defend one’s home.

4       3. While threatening the seizure of firearms for failure to fund the city’s chosen  
5 nonprofits in violation of the Second Amendment, the Ordinance does *nothing* to deter the scourge of  
6 unlawful ownership and use of guns by criminals or to recoup from them compensation for the  
7 extensive injuries and costs they cause. According to the City’s own statistics in support of the  
8 Ordinance, “Injuries from unintentional shootings” nationally only comprise about a third of all gun-  
9 related injuries, Ordinance §10.32.200.B.10, and in the period from 2010 to 2014, only “thirty-one  
10 percent (31%) of emergency department visits and sixteen percent (16%) of hospitalizations from  
11 firearms injuries were due to unintentional shootings.” *Id.* at §10.32.200.B.4. Consequently, this  
12 Ordinance—largely directed as it is at gun safety and liability protection for *unintentional* acts—does  
13 virtually *nothing* to impose its costs on the primary source of gun violence and its associated harms  
14 in San Jose: criminals committing intentional acts of violence with guns.

15       4. Further, the Ordinance calculates the cost to San Jose “per-firearm owning household”  
16 based on all of the costs (\$39.7M) arising from responses to “gun violence,” including “incident  
17 investigation,” “perpetrator adjudication” and “judicial sanctioning”—i.e., responses to intentional  
18 criminal activity. *Id.* at §10.32.200.B.8. And yet, the Ordinance does not impose these costs on  
19 criminals but rather on lawfully gun-owning households. The Ordinance seeks to impose financial  
20 pressure (“incentivizing” or “encouraging” in the words of the Ordinance at sections 10.32.200.B.11-  
21 12) on gun owners. But the Ordinance applies its pressure to lawful gun owners exercising their  
22 constitutional right to keep arms in the home for self-defense against the violent criminals who are  
23 actually causing the harm and costs the Ordinance claims it is trying to reduce.

24       5. By compelling gun owners to directly pay and therefore subsidize the advocacy of an  
25 unnamed government-chosen nonprofit for the purpose of preaching the harms of gun ownership  
26 back at them, as appears to be the intent and function of the Gun Harm Reduction Fee, the Ordinance  
27 also violates the First Amendment rights of gun owners.

28 //

6. Additionally, the Ordinance violates Article XIII C of the California Constitution because the Gun Harm Reduction Fee and penalty-backed insurance mandate constitute taxes within the meaning of the California Constitution which were not approved by the voters. Finally, the Ordinance violates the San Jose City Charter because, by commanding gun owners to directly pay one nonprofit for unspecified programs not controlled by the City Council, it unlawfully deprives the City Council of its budget and appropriations powers and the City Manager of their powers as the City's chief administrative officer, and violates a Charter requirement that City funds only be deposited into City accounts.

7. To preserve the safety and core rights under the Constitution of the law-abiding citizens of the City of San Jose, as well as their rights under the California Constitution and the City Charter, this Court must prevent Defendants from enforcing the unconstitutional and unlawful Ordinance.

#### JURISDICTION AND VENUE

8. This Court has federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331 because it arises under the First, Second, and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983. This Court has authority under 28 U.S.C. §§ 2201 and 2202 to grant declaratory relief and other relief, including preliminary and permanent injunctive relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure.

9. This Court has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over the state law claims regarding the City of San Jose's lack of authority to pass the Ordinance because the federal claims and this state claim are so related that they form part of the same case or controversy.

10. Venue is proper in the Northern District of California under 28 U.S.C. § 1391(b)(1) because Defendants are officials of the City of San Jose, which is within the geographical boundaries of the Northern District of California. Defendants are also residents of this State within the meaning of 28 U.S.C. § 1391(c).

11. The Court has personal jurisdiction over the Defendants because the City of San Jose is within the State of California.

//

**INTRADISTRICT ASSIGNMENT**

12. This action is properly assigned to the San Jose Division, pursuant to Civil L.R. 3-2(e). A substantial part of the events giving rise to the claims occurred in Santa Clara County, California.

**PARTIES**

13. Plaintiff NAGR is a non-stock, nonprofit corporation incorporated under the laws of the Commonwealth of Virginia and has its principal place of business in Loveland, Colorado. NAGR is a grassroots organization whose mission is to defend the right to keep and bear arms under the Second Amendment and advance the constitutional right by educating the American people and urging them to action in public policy. NAGR has members who would be subject to the Ordinance within the City of San Jose.

14. Plaintiff Mark Sikes resides in San Jose, California. Sikes legally owns a gun, is not a peace officer, does not have a concealed carry permit, and does not meet the qualifications of CAL. GOV. CODE § 68632 (a) and (b) and, therefore, would be subject to the Ordinance if it were to go into effect.

15. Defendant City of San Jose is a municipal corporation within the County of Santa Clara, California. A true and correct copy of the City of San Jose's City Charter is attached as Exhibit "A."

16. Defendant Jennifer Maguire ("Maguire") is the current and active City Manager for the City of San Jose. San Jose's Charter states that the City Manager is the "Chief Administrative Officer and head of the administrative branch of the City government." San Jose City Charter §§ 502, 701. "The City Manager shall be responsible for the faithful execution of all laws, provisions of this Charter, and acts of the Council which are subject to enforcement by the City Manager or by the officers who are under the City Manager's direction and supervision." *Id.*, § 701(d). Additionally, the City Manager is directly identified with enforcement authority throughout the Ordinance. Ordinance §§ 10.32.205, 210, 215, 235, & 250.

17. Defendant San Jose City Council (the "City Council") is vested with authority under Article IV of the City of San Jose's City Charter (Ex. A). The Ordinance vests the City Council with authority to "set forth the schedule of fees and charges established by resolution of the City Council"

1 and to “set forth...the schedule of fines” for those who violate the ordinance. *Id.*, § 10.32.215;  
 2 10.32.250; 10.32.240.

### 3 **STATEMENT OF FACTS**

#### 4 **Enactment of the Ordinance**

5 18. On June 29, 2021, the City Council directed San Jose City Attorney Nora Frimann “to  
 6 return to Council with an ordinance for Council consideration that would require every gun owner  
 7 residing in the City of San José, with certain exceptions, to obtain and maintain a City-issued  
 8 document evincing payment of an annual fee, and attestation of insurance coverage for unintentional  
 9 firearm-related death, injury, or property damage.” Frimann Mem. re Gun Harm Reduction Ord., Jan.  
 10 14, 2022, 1 (“City Attorney Mem.”) (a true and correct copy is attached as Exhibit “B”). Plaintiff  
 11 National Association for Gun Rights immediately sent the City a cease and desist letter warning that  
 12 the proposed ordinance was unconstitutional. Ltr. from H. Dhillon and D. Warrington to San Jose City  
 13 Council, July 14, 2021 (a true and correct copy is attached as Exhibit “C”).

14 19. On January 14, 2022, in advance of the City Council’s January 25 meeting, the City  
 15 Attorney issued a memorandum in compliance with the City Council’s directions that recommended  
 16 the Council “[c]onsider approving an ordinance amending Title 10 of the San José Municipal Code to  
 17 add Part 6 to Chapter 10.32 to reduce gun harm by: (a) requiring gun owners to obtain and maintain  
 18 liability insurance; and (b) authorizing a fee to apply to gun harm reduction programs.” City Attorney  
 19 Mem. at 1 (Ex. B). Under a section addressing penalties for noncompliance, the City Attorney stated  
 20 that “[f]ailure to comply shall constitute a civil violation subjecting the owner to the temporary or  
 21 permanent seizure of the gun, and under specified circumstances, a fine.” *Id.* at 2.

22 The City Attorney concluded:

23 If *approved*, the proposed ordinance will require, with certain exceptions, that San José  
 24 residents who own firearms: (a) obtain and maintain liability insurance; (b) pay an annual gun  
 25 harm reduction fee to a designated nonprofit organization that will use the fee proceeds to  
 26 provide gun harm reduction services to residents of the City who own or possess a gun or to  
 27 members of their household; and (c) pay any City cost recovery fees associated with program  
 28 implementation, including any associated third-party costs.

1 *Id.* at 2 (emphasis added).

2 20. In an op-ed published on January 19 in the Los Angeles Times, San Jose Mayor Sam  
3 Liccardo wrote “[l]ast June our City Council unanimously approved my proposals that will mitigate  
4 gun harm in our community — and a *final vote* on Jan. 25 should turn them into law.” Mayor Sam  
5 Liccardo, *Op-Ed: My City’s New Gun Control Laws Will Help More Than Waiting On Congress To*  
6 *Do Something*, LOS ANGELES TIMES, Jan. 19, 2022, [https://www.latimes.com/opinion/story/2022-01-](https://www.latimes.com/opinion/story/2022-01-19/op-ed-new-gun-control-laws-help-congress)  
7 [19/op-ed-new-gun-control-laws-help-congress](https://www.latimes.com/opinion/story/2022-01-19/op-ed-new-gun-control-laws-help-congress) (emphasis added)(a true and correct copy is attached as  
8 Exhibit “D”).

9 21. On January 21, 2022, Mayor Liccardo, Vice Mayor Jones, Councilmember Cohen, and  
10 Councilmember Carrasco issued “Directions” to the City Council, including to “[a]pprove the  
11 proposed ordinance,” with certain modifications. Mayor’s Mem. to City Council, Jan. 21, 2022, 2 (a  
12 true and correct copy is attached as Exhibit “E”). The Mayor’s Memorandum also noted that  
13 “Members of the California legislature are exploring bills to have law enforcement agencies seize  
14 guns *as a sanction for violations of local gun regulations*, with subsequent restoration of ownership as  
15 required by constitutional due process.” *Id.* at 4 (emphasis added).

16 22. The Agenda for the City Council’s January 25, 2022, meeting further stated that the  
17 recommendation before the Council was to “[c]onsider approving” the Ordinance. Agenda for Jan.  
18 25, 2022 City Council Meeting (a true and correct copy is attached as Exhibit “F”). The City’s  
19 Synopsis for what occurred at its January 25, 2022, City Council Meeting also states that the action  
20 before the Council was to “[c]onsider approving” the Ordinance and the Synopsis records that the  
21 Ordinance was indeed “approved” through two votes regarding various changes. Tuesday, January  
22 25, 2022 City Council Meeting Synopsis at 13 (a true and correct copy is attached as Exhibit “G”).

23 23. The Mayor immediately issued a press release the night of the vote, in which he  
24 boasted that “Tonight San José *became* the first city in the United States *to enact* an ordinance to  
25 require gun owners to purchase liability insurance, and to invest funds generated from fees paid by  
26 gun owners into evidence-based initiatives to reduce gun violence and gun harm.” Liccardo Press  
27 Release, Jan. 25, 2022 (emphasis added) (a true and correct copy is attached as Exhibit “H”).

28 24. Within 24 hours, articles were published about San Jose enacting an unprecedented

1 regulation of gun ownership, including in the San Francisco Chronicle and the Los Angeles Times.  
2 See Lauren Hernández, *Gun Owners In San Jose Must Buy Liability Insurance Under Newly Passed*  
3 *First-In-The-Nation Law*, SAN FRANCISCO CHRONICLE, Jan. 25, 2022 (updated Jan. 26, 2022)  
4 [https://www.sfchronicle.com/bayarea/article/Gun-owners-in-San-Jose-must-buy-liability-](https://www.sfchronicle.com/bayarea/article/Gun-owners-in-San-Jose-must-buy-liability-16804951.php)  
5 [16804951.php](https://www.sfchronicle.com/bayarea/article/Gun-owners-in-San-Jose-must-buy-liability-16804951.php) (a true and correct copy is attached as Exhibit “I”) (“The San Jose City Council  
6 adopted a measure Tuesday night requiring gun owners in the South Bay city to buy liability  
7 insurance for their firearms, city officials said.”); Olga R. Rodriguez and Juliet Williams, *San Jose*  
8 *Approves First Law In U.S. Requiring Gun Owners To Have Insurance*, LOS ANGELES TIMES, Jan. 25,  
9 2022, <https://www.latimes.com/california/story/2022-01-25/san-jose-gun-liability-insurance> (a true  
10 and correct copy is attached as Exhibit “J”) (“The city of San Jose voted Tuesday night to require gun  
11 owners to carry liability insurance in what’s believed to be the first measure of its kind in the United  
12 States. The San Jose City Council overwhelmingly approved the measure despite opposition from  
13 some gun owners who said it would violate their 2nd Amendment rights.”).

14 25. Consistent with the Mayor’s pre- and post-meeting statements, and the interpretations  
15 of reputable journalists reporting on the Council’s action, Plaintiffs considered the City Council’s vote  
16 to potentially constitute the “final approval” or enactment of the Ordinance and immediately filed suit  
17 to protect their rights and those of the citizens of San Jose.

18 26. The City’s new position, first taken in this litigation, is that contrary to the Mayor’s and  
19 City Council’s pronouncements before and after the January 25, 2022, City Council meeting, the City  
20 Council did not actually “enact” or provide the “final approval” for the Ordinance on January 25  
21 because it would have violated the City Charter for them to do so. The City now states the ordinance  
22 could only have ever been truly enacted at the City Council’s February 8, 2022, meeting on its  
23 “second reading,” (Mem. Supp. Mot. Dismiss 3), notwithstanding the Mayor’s statements to the  
24 contrary before and after the January 25 Council meeting. The Ordinance was placed on the Council’s  
25 consent calendar for its February 8, 2022, meeting and on that day the Council voted a second time to  
26 approve the Ordinance.

27 27. In any event, regardless of whether the Mayor’s statements about the enactment of  
28 the Ordinance or the City’s published records about its approval were incorrect or misleading, a

1 true and correct copy of the now-indisputably enacted Ordinance, as shown on the City’s website,  
2 is attached as Exhibit “K.”

### 3 **The Burdens of the Ordinance**

4 28. The Ordinance will require an estimated 50,000-55,000 gun-owning San Jose Citizens,  
5 minus a few exceptions, to obtain an insurance policy and pay annual fees simply to exercise the  
6 same constitutional right to own a gun that existed prior to this ordinance. Liccardo Mem. re Gun  
7 Harm Reduction Ord., Jan., 19, 2022 (a true and accurate copy is attached as Exhibit “L”).

8 29. The Ordinance states that “[t]o the extent allowed by law, the Firearm or Firearms of a  
9 person that [*sic*] is not in compliance with [the Ordinance] may be impounded subject to a due  
10 process hearing.” Ordinance § 10.32.245. Further, “[a]ny violation” of the Ordinance is “punishable  
11 by an administrative citation,” “fines for violations,” and “all other civil and administrative remedies  
12 available to the City.” *Id.*, § 10.32.240; *see also* Mayor’s Mem. to City Council, Jan. 21, 2022 (Ex. E)  
13 (“Members of the California legislature are exploring bills to have law enforcement agencies seize  
14 guns as a sanction for violations of local gun regulations . . .”); City Attorney Frimann Memo. at 2  
15 (Ex. B)(“Failure to comply [with the Ordinance] shall constitute a civil violation subjecting the owner  
16 to the temporary or permanent seizure of the gun, and under specified circumstances, a fine.”).

17 30. The Ordinance targets guns in the home. It does not apply to people who have a license  
18 to carry a concealed weapon. *Id.*, § 10.32.225. Additionally, absent a concealed carry permit, there is  
19 no other way to carry a firearm in San Jose. *See* CAL. PENAL CODE §§ 25850, 26150, 26155, 26350,  
20 26400. The Ordinance thus would charge all law-abiding owners of guns for home and self-defense to  
21 pay for the harms caused by criminals who use unregistered guns to commit acts of violence.  
22 Ordinance § 10.32.200.B.8 (identifying costs the Ordinance seeks to recoup to include those arising  
23 from homicides and all firearm-related injuries).

### 24 **Insurance Requirement**

25 31. The Ordinance conditions the constitutional right to own a gun on the payment of an  
26 unstated amount for insurance. It states that “A person who resides in the City of San Jose and owns  
27 or possesses a Firearm in the City shall obtain and continuously maintain in full force and effect a  
28 homeowner’s, renter’s or gun liability insurance policy...specifically covering losses or damages



1 resulting from any accidental use of the Firearm, including but not limited to death, injury, or property  
2 damage.” Ordinance § 10.32.210.A.

3 32. This requirement does not contain any information about minimum insurance coverage  
4 thresholds or premiums. Thus, the City of San Jose has conditioned the constitutional right of its law-  
5 abiding citizens to own a gun on an unstated, unregulated price to be set by an industry of for-profit  
6 private sector corporations.

7 33. Moreover, the City’s findings did not include any evidence that there are available  
8 insurance policies “specifically covering losses or damages resulting from any accidental use of”  
9 firearms, or what any such policy will cost. *See* Ordinance § 10.32.200.B.10 (“[i]njuries from  
10 unintentional shootings . . . are *generally* insurable” (emphasis added)).

11 34. The Ordinance does nothing to ensure that insurance companies will provide policies  
12 “specifically covering” losses arising from accidental firearm use for any and every citizen who is  
13 subject to the Ordinance, which means the City’s insurance mandate would establish a precondition to  
14 gun ownership that empowers for-profit insurance companies (with or without government pressure)  
15 to prohibit persons from exercising their Second Amendment rights.

16 35. Further, the Ordinance does not indicate there is any way for taxpayers to file claims  
17 against insurers to recover the city’s expenses. *See id.* § 10.32.210 (stating only that policies must  
18 cover “death, injury, or property damage”).

### 19 ***Fee Requirement***

20 36. The second primary component of the Ordinance is the creation of a “fee” for owning a  
21 gun. The Ordinance states that “A person who resides in the City and owns or possesses a Firearm in  
22 the City shall pay an Annual Gun Harm Reduction Fee to the Designated Nonprofit Organization each  
23 year.” Ordinance § 10.32.215. No fee amount is specified, nor is there criteria for how to calculate the  
24 fee. *Id.* Rather, Defendant City Council reserved the right for itself to determine the fee amount at a  
25 later date. *Id.*

26 37. The destination of the money is to an undetermined nonprofit. That determination is  
27 delegated to Defendant Maguire. *Id.*, §§ 10.32.205.B; 10.32.220.

28 38. The nonprofit fee in the Ordinance is not to defray the City’s administrative costs.

1 Rather, “all monies...shall be expended by the Designated Nonprofit Organization....” *Id.*,  
 2 § 10.32.220.A.

3 39. The only selection criteria for the Designated Nonprofit Organization is that it  
 4 “provid[e] services to residents of the City that own or possess a Firearm in the City or to members of  
 5 their household, or to those with whom they have a close familial or intimate relationship.” These  
 6 services “include, *but are not necessarily limited to*” suicide prevention services or programs, violence  
 7 reduction or gender based violence services or programs, mental health services related to gun  
 8 violence, firearms safety education or training, or addiction intervention and substance abuse  
 9 treatment. *Id.*, § 10.32.220.A (emphasis added).

10 40. “[T]he City shall not specifically direct how the monies from the Gun Harm Reduction  
 11 Fee are expended” by the nonprofit. *Id.*, § 10.32.220.C.

12 41. The fee thus functions to compel gun owners to give their money to a government-  
 13 approved nonprofit to spend on unspecified programs at the nonprofit’s discretion, none of which are  
 14 services that the City is obligated to perform. This compelled donation by gun owners to one City-  
 15 favored nonprofit to advocate about the dangers of gun ownership with little to no municipal oversight  
 16 is not only obnoxious to the Constitution, it is an invitation to corruption and waste.

17 42. By its plain terms, this fee and insurance requirement do not compensate the City to  
 18 cover reasonable costs of governmental activity, because they are not for government activity. Further,  
 19 the manner in which those costs are allocated to gun owners do not bear a fair or reasonable  
 20 relationship to the gun owner’s burdens on, or benefits received from, the City’s governmental  
 21 activity.

22 43. Indeed, the Ordinance also authorizes a separate fee just to recoup the costs associated  
 23 in administering the Ordinance. *Id.* § 10.32.250.

24 44. Accordingly, as discussed further below, the “Annual Gun Harm Reduction Fee”—  
 25 unconnected to the cost of City services and for unspecified programs outside of the City’s control—  
 26 and the mandatory insurance requirement backed by the threat of fines and seizure are nothing more  
 27 than exactions, or *taxes* within the meaning of the California Constitution, that the City is imposing on  
 28 the exercise of a constitutional right.

**The Second Amendment**

45. The Second Amendment to the United States Constitution states that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const., amend. II.

46. “[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010).

47. Even in the face of “the problem of handgun violence in this country,...the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636.

48. “The upshot of [*Heller* and *McDonald*] is that there now exists a clearly-defined fundamental right to possess firearms for self-defense within the home.” *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011).

49. Local governments, including the City of San Jose, are bound by the Second Amendment. *McDonald*, 561 U.S. at 790; *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012).

50. Imposing an insurance mandate and fees (or taxes) on gun owners in the City of San Jose burdens Plaintiff NAGR’s members and Plaintiff Sikes by creating an indefinite cost on their ability to exercise their basic and fundamental right to possess a gun. “A tax that burdens rights protected by the [Constitution] cannot stand unless the burden is necessary to achieve an overriding governmental interest.” *Minneapolis Star and Tribune*, 460 U.S. at 582.

51. Both the insurance mandate and the fees created by the Ordinance are costs subject to the whims of the City Council and private insurance companies and, thus, bear a significant risk of making gun ownership far more expensive, if not cost prohibitive. As a form of fixed tax disconnected from a person’s income or the monetary value of a person’s firearms, it is an especially regressive one.

52. The Ordinance cites a number of statistics about gun violence, but provides no studies or statistics that gun liability insurance will reduce gun violence. Rather, it in conclusory fashion states that “Liability insurance can reduce the number of gun incidents by encouraging safer

1 behavior....” Ordinance § 10.32.200.B.12. It is not apparent how liability insurance will meaningfully  
2 add to the extant incentives for safe behavior, such as the fear of potentially killing another human  
3 being (intentionally or by accident), being prosecuted, or being sued.

4 53. The Ordinance does not include any studies or statistics showing that the yet-to-be-  
5 determined nonprofit will accomplish the stated aim of reducing gun violence. Rather, in conclusory  
6 fashion, it states that “Programs and services to gun owners and their households can also encourage  
7 safer behavior, and provide education and resources to those residents.” *Id.*, § 10.32.200.B.13.

8 54. The Ordinance cites a figure that “San Jose taxpayers annually spend approximately  
9 \$39.7 million, or approximately \$151 per firearm-owning household, to respond to gun violence with  
10 such public services as emergency police and medical response, victim assistance, incident  
11 investigation, acute and long-term care, and perpetrator adjudication and judicial sanctioning.” It cites  
12 figure of \$442 million in gun-related costs if the calculation includes “private costs to individuals and  
13 families.” *Id.*, § 10.32.200.B.8-9. But the Ordinance does not distinguish how much of these costs are  
14 due to intentional violent criminal conduct that the Ordinance will hardly address as opposed to the  
15 types of unintentional conduct it is largely focused on.

16 55. Despite the per-household fee being based on the City’s assessment of the overall cost  
17 of guns to San Jose, the fee will not reimburse the City, taxpayers, or private individuals because the  
18 fee will be distributed entirely to a nonprofit. Likewise, the insurance will not reimburse the City,  
19 taxpayers, or private individuals for any intentional gun violence committed by criminals and most  
20 costs incurred by the City/taxpayers, such as ambulance, police, and judicial costs, would not be the  
21 type of costs covered by an insurance carrier.

22 56. Therefore, neither the insurance mandate nor the nonprofit fee fit any stated, or  
23 unstated, government objective.

24 57. Additionally, governments “may not impose a charge for the enjoyment of a right  
25 granted by the federal constitution.” *Murdock*, 319 U.S. at 113.

26 58. The only exception is to “meet the expense incident to the administration of the act and  
27 to the maintenance of public order in the matter licensed.” *Cox v. New Hampshire*, 312 U.S. 569, 577  
28 (1941). Applied to the Second Amendment, “imposing fees on the exercise of constitutional rights is

permissible when the fees are designed to defray (and do not exceed) the administrative costs of regulating the protected activity.” *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2nd Cir. 2013).

59. Neither the insurance premium nor the fee to be paid to the City’s chosen nonprofit are designed to defray the City’s administrative costs and, therefore, they are unconstitutional.

#### **The First Amendment**

60. The First Amendment, applied to the states through the Fourteenth Amendment, protects the freedom of speech, including both the right to speak freely and the right to refrain from speaking at all, and to avoid associating with others for expressive purposes. The First Amendment thus prohibits government officials from forcing individuals to support views that they find objectionable.

61. Thomas Jefferson famously said that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.” *Janus v. AFSCME*, 138 S.Ct. 2448, 2464 (2018) (quoting *A Bill for Establishing Religious Freedom*, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

62. The Ordinance directs gun owners to subsidize one unidentified nonprofit by paying the city’s fee directly to that organization. Ordinance § 10.32.215. The Ordinance even prohibits the city from directing how the nonprofit would use the funds. *Id.* at § 10.32.220.C. The one thing that is clear is that the organization will likely be dedicated to exclusively preaching the negative risks of gun ownership, and the Ordinance does not prohibit the nonprofit from using the City’s fee revenues for other messages and programs.

63. The Defendants may not force Plaintiffs to pay fees to nonprofits when those fees are going to be used to fund activities of ideological or political nature with which Plaintiffs disagree, *see Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), or in fact are left unstated.

64. The Ordinance therefore unconstitutionally compels Plaintiffs to subsidize speech and associate against their will and this Court should therefore preliminarily and permanently enjoin Defendant from enforcing the Ordinance and award Plaintiffs nominal damages.

#### **California Constitution-Preemption**

65. Article XI, section 7 of the California Constitution states that “A county or city may

1 make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not  
2 in conflict with general laws.”

3 66. Article XI, section 7 of the California Constitution preempts any local law that  
4 “duplicates, contradicts, or *enters an area fully occupied by general law*, either expressly or by  
5 legislative implication.” *Fiscal v. City and County of San Francisco* 158 Cal.App.4th 895, 903 (Cal.  
6 Ct. App. 2008)(quotation omitted)(emphasis added).

7 67. “[T]he Legislature intended to occupy the field of residential handgun possession to the  
8 exclusion of local government entities.” *Id.* at 909.

9 68. Gun regulation is already fully occupied by the state of California. Indeed, California  
10 already comprehensively regulates firearms, including firearm safety, CAL. PENAL CODE §§ 23500-  
11 23520, the appearance of firearms, *id.*, §§ 23800-24790, storage of firearms, *id.*, §§ 25000-25225,  
12 how to handle lost or stolen firearms, *id.*, §§ 25250-25225, carrying firearms, *id.*, §§ 25300-26406, the  
13 sale, lease, or transfer of firearms, *id.*, §§ 26500-28490, the registration and assignment of firearms,  
14 *id.*, §§ 28010-28024, how to transfer firearms between private persons, *id.*, §§ 28050-28070,  
15 recordkeeping, background checks, and fees related to transfer, *id.*, §§ 28100-28490, the manufacture  
16 of firearms, *id.*, §§ 29010-29184, who may not possess a firearm, *id.*, §§ 29610-30165, rules  
17 pertaining to “firearm equipment,” *id.*, §§ 30150-30165, and, in some cases, firearm registration, *id.*,  
18 §§ 30900-30965. This is but a sample of all of the separate statutes regulating firearms in California.  
19 *See generally* CAL. PENAL CODE §§ 23500-34370.

20 69. Thus, the City of San Jose’s Ordinance violates the California Constitution because it  
21 is preempted by California state law.

### 22 California’s Local Tax Requirements

23 70. All taxes imposed by local governments in California must be approved by voters of  
24 the local government. CAL. CONST. art. XIII C. A “tax” in California, with exceptions that do not  
25 apply here, is defined as “any levy, charge, or *exaction of any kind* imposed by a local government.”  
26 Article XIII C, § 1(e) (emphasis added).

27 71. The Ordinance’s insurance mandate and Gun Harm Reduction Fee do not pay for City  
28 services and do not correspond to any benefit received from City services by those who pay for them.

1           72.     The insurance mandate and the Gun Harm Reduction fee are thus taxes which were not  
2 submitted to the electorate for approval and, therefore, violate the California Constitution.

3                                   **The San Jose City Charter**

4           73.     The San Jose City Charter vests in the City Council “[a]ll powers of the City and the  
5 determination of all matters of policy.” San Jose City Charter § 400. These powers include the  
6 exclusive authority to impose taxes. *Id.*, § 602(c). With regard to the expenditure of City funds, only  
7 the City Council has the power to establish a budget. *Id.* §§ 1204, 1206. The Council also has the sole  
8 power to appropriate the expenditure of City funds. *Id.*, § 1207.

9           74.     The City Manager is the “Chief Administrative Officer and head of the administrative  
10 branch of the City government.” *Id.*, §§ 502; 701.

11           75.     “All revenues and receipts which are not required by [the] Charter, State law or  
12 ordinances to be placed in special funds shall be credited to the [City’s] General Fund.” *Id.*, § 1211.  
13 The General Fund is “a medium of control and accounting for all City activities excepting activities  
14 for which special funds are established and maintained.” *Id.*

15           76.     The Ordinance, by prohibiting the City from directing how “monies from the Gun  
16 Harm Reduction fee are expended” by the chosen nonprofit, Ordinance § 10.32.220.C, violates the  
17 San Jose City Charter’s reservation of budgeting and appropriation power to the City Council.

18           77.     The Ordinance also violates the City Charter’s delegation of executive functions to the  
19 “administrative” branch of the City Government under the leadership and control of the City Manager  
20 because the Ordinance says “the City shall not specifically direct how the monies from the Gun Harm  
21 Reduction Fee are expended” other than vague directions to the nonprofit to “reduce the risk” of harm  
22 from using firearms, “mitigate the risk” of harm or liability from possessing firearms, and to spend the  
23 City’s funds in ways including, *but not limited to*, various services. *Id.*, § 10.32.220.A, C.

24           78.     The Ordinance, by requiring gun owners to pay the City-required, City-determined fee  
25 directly to a nonprofit organization, *id.*, § 10.32.215, thereby diverts a City fee to a nonprofit rather  
26 than the City’s General Fund, and thus violates the City Charter’s requirement that all City revenues  
27 and receipts be deposited into City accounts as an essential means of City “control and accounting.”  
28 This too is an invitation to corruption, waste, and fraud.



1           79.     The Ordinance also violates California Government Code § 43400 that requires all  
2     “money received from licenses, street poll taxes, fines, penalties, and forfeitures shall be paid into the  
3     general fund.”

4   \*       \*       \*       \*

5           80.     In sum, the Ordinance violates the Second Amendment by infringing upon the right to  
6     keep and bear arms, violates the First Amendment by forcing gun owners to associate with and pay a  
7     donation subsidizing the virtually unrestricted speech of a private non-governmental nonprofit  
8     organization, violates article XI, §7 of the California Constitution because state law thoroughly  
9     occupies and preempts the field of gun regulation, violates article XIII C of the California  
10    Constitution by failing to submit a local tax to the voters for approval, violates the San Jose City  
11    Charter’s budget, appropriations, and separation of powers provisions, and violates controls on the  
12    handling of city receipts under the City Charter.

13          81.     Accordingly, Plaintiffs request that this court issue preliminary and permanent  
14    injunctions preventing Defendants from enforcing the Ordinance in its entirety pursuant to 42 U.S.C.  
15    § 1983, declare the Ordinance unconstitutional in its entirety under both the United States and  
16    California Constitutions, declare that the Ordinance violates the San Jose City Charter and the  
17    California Government Code, issue nominal damages, and order any other relief this Court deems  
18    necessary and proper.

#### 19   **FIRST CLAIM FOR RELIEF**

20                   **Violation of the Second and Fourteenth Amendments (42 U.S.C. § 1983)**  
21                   ***The Ordinance requiring owners of guns to purchase insurance and pay annual fees***  
22                   ***violates the Second and Fourteenth Amendments to the United States Constitution.***

22          82.     Plaintiffs incorporate by reference and re-allege each of the Paragraphs set forth above.

23          83.     The Second Amendment of the United States Constitution guarantees “the right of the  
24    people to keep and bear arms” and that right “shall not be infringed.” U.S. CONST., amend. II.

25          84.     In a Second Amendment inquiry, a Court asks “whether the challenged law burdens  
26    conduct protected by the Second Amendment[.]” *United States v. Chovan*, 735 F.3d 1127, 1136 (9th  
27    Cir. 2013).

28          85.     Government “may not impose a charge for the enjoyment of a right granted by the

1 federal constitution.” *Murdock*, 319 U.S. at 113. For example, in 1973 the Minnesota legislature  
2 passed a use tax on paper and ink. The Supreme Court struck down this special use tax because it  
3 singled out the press for special treatment and the Court found that a “tax that burdens rights  
4 protected by the [Constitution] cannot stand unless the burden is necessary to achieve an overriding  
5 governmental interest.” *Minneapolis Star and Tribune Co.*, 460 U.S. at 581.

6 86. This is particularly true because the exercise of a constitutional right cannot be  
7 conditioned upon a fee unless it is to defray an administrative expense. *Cox*, 312 U.S. at 577; *Kwong*,  
8 723 F.3d at 165.

9 87. The Ninth Circuit has adopted the *Murdock/Cox* standards for Second Amendment fee  
10 cases. *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017).

11 ***The Ordinance Violates the Second Amendment***

12 88. Both the Ordinance’s Gun Harm Reduction Fee and insurance mandate impose costs  
13 on gun owners in the City of San Jose just for exercising their Second Amendment rights.

14 89. If the City has the power to impose these arbitrary burdens on gun ownership, there  
15 would be no limiting principle to the amount of the fees and costs the City could mandate and  
16 nothing to prevent the City from extinguishing the Second Amendment within its borders entirely.

17 90. Though the Ordinance threatens the confiscation of guns and an unspecified fine for  
18 noncompliance with its insurance and Gun Harm Reduction Fee, it does not specify a sum certain or  
19 articulate standards that will determine the cost of the insurance requirement or either fee that the  
20 Ordinance creates. Therefore, the as yet unknown financial burden of the Ordinance’s insurance  
21 requirement will be left to the whims of for-profit insurance companies without a clear standard for  
22 what their policies must cover. The City’s fees, too, are left unstated and deferred to future,  
23 unscheduled determinations of the City Council in an exercise of unfettered discretion. Any  
24 statement by the City now regarding a minimal cost or burden rings hollow because there are no  
25 constraints on the City’s authority to increase the costs and burdens tomorrow.

26 91. The City’s dictate that the right to gun ownership will depend on citizens having an  
27 unspecified insurance policy and payment of as-yet undetermined fee to a third party who has yet to  
28 be chosen to fund unspecified programs beyond the City’s control will chill and infringe upon on

1 those citizens' Second Amendment rights.

2 92. It is plausible, if not probable, that the Ordinance will discourage gun ownership, if not  
3 make it cost prohibitive, for at least some San Jose residents, particularly in light of the view of gun  
4 ownership reflected in the Ordinance's findings.

5 93. Where, as here, taxes and fees are not anchored to value or income, they are also  
6 inherently regressive; their burden on citizens' rights will be inversely proportional to those citizens'  
7 ability to pay the taxes and fees.

8 94. At the very least, any such a cost "infringe[s]" upon the constitutional right to keep and  
9 bear arms.

10 ***The Ordinance Does Not Serve Its Claimed Purpose or Any Other Valid Purpose***

11 95. The Ordinance's "Purpose and Findings" recites facts about homicide, suicide,  
12 accidental injury and death, hospitalizations, probabilities of incidents as they correlate to gun  
13 ownership, and statistics from automobile insurance. Ordinance § 10.32.200.B. Accordingly, the City  
14 of San Jose appears to claim a stated objective of reducing gun violence.

15 96. However, requiring gun owners to purchase an insurance policy and pay an annual fee  
16 to an unnamed nonprofit are not a reasonable fit to the asserted objective of reducing gun violence  
17 insofar as the violence to be reduced is committed by persons who do not register their guns and use  
18 their guns to commit crimes, or the injuries are inflicted by persons other than the guns' owners.

19 97. The City makes no findings, other than conclusory statements, that insurance or  
20 funding nonprofits will impact gun violence, particularly gun violence by those who lawfully possess  
21 and register their firearms to be kept in the home as opposed to others who possess guns either  
22 unlawfully or outside the home. *See generally id.*, § 10.32.200.B. That the Ordinance does not in fact  
23 control how the chosen nonprofit would spend the City's fees, and specifically forbids the City from  
24 directing the spending of its own funds, further undermines the contention that payment of the fee  
25 would achieve the Ordinance's aims.

26 98. The Ordinance cites a figure that "San Jose taxpayers annually spend approximately  
27 \$39.7 million, or approximately \$151 per firearm-owning household, to respond to gun violence with  
28 such public services as emergency police and medical response, victim assistance, incident

1 investigation, acute and long-term care, and perpetrator adjudication and judicial sanctioning.”  
 2 Ordinance § 10.32.200.B.8. It includes a sum of \$442 million if the calculation includes “private costs  
 3 to individuals and families.” *Id.*, § 10.32.200.B.9. But more than \$328,355,500 (or 74%) of these  
 4 alleged costs are for the impact of guns on “quality of life” and a further \$78,272,000 (or 18%) of the  
 5 asserted \$442 million is for “lost work.” Liccardo Mem. re Gun Harm Reduction Ord., Jan., 19, 2022  
 6 (Ex. L).

7 99. However, the Gun Harm Reduction Fee will not reimburse the City, taxpayers, or  
 8 private individuals because the fee will be distributed entirely to a nonprofit. Likewise, the insurance  
 9 will not likely reimburse the City, taxpayers or private individuals for any intentional gun violence  
 10 committed by gun owners or injuries inflicted by uninsured persons or premises and, even if the gun  
 11 owner is insured, costs incurred by the City/taxpayers, such as ambulance, police, and judicial costs,  
 12 would not be reimbursed by an insurance carrier. Thus, the insurance and fee requirements do not fit  
 13 the government interest in reimbursing the costs incurred by the City/taxpayers or most private  
 14 individuals or their families who are injured through criminal gun violence (the majority of gun  
 15 injuries).

16 100. To the extent that Defendants will assert a separate government interest, said  
 17 government interest would not be significant, substantial, or important.

18 101. To the extent that Defendant will assert a separate government interest, requiring gun  
 19 owners to pay insurance and an annual fee to an unnamed nonprofit does not constitute a reasonable  
 20 fit for any other government interest.

21 102. Neither the insurance requirement nor the fee requirement is historically or  
 22 presumptively lawful, in that, the Ordinance is a first-of-its-kind regulation of firearms.

23 \* \* \* \*

24 103. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm  
 25 to their constitutional rights unless Defendants are enjoined from implementing and enforcing the  
 26 Ordinance.

27 104. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled preliminary and  
 28 permanent injunctive relief invalidating and restraining enforcement of the Ordinance as well as

1 declaratory relief.

2 105. Plaintiffs found it necessary to engage the services of private counsel to vindicate their  
3 rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42  
4 U.S.C. § 1988.

## 5 SECOND CLAIM FOR RELIEF

6 **Violation of the First and Fourteenth Amendments (42 U.S.C. § 1983)**  
7 *The payment of a fee to a nonprofit violates the free speech rights of gun owners by*  
8 *compelling them to subsidize private speech on matters of substantial public concern.*

9 106. Plaintiffs incorporate by reference and re-allege herein each of the Paragraphs set forth  
10 above.

11 107. The First Amendment protects Plaintiffs' freedom of speech which includes both the  
12 right to speak freely and the right to refrain from speaking at all.

13 108. The First Amendment protects the right of Plaintiffs to eschew association for  
14 expressive purposes.

15 109. The First Amendment prohibits government officials from forcing individuals to  
16 support views that they find objectionable.

17 110. Thomas Jefferson famously said that "to compel a man to furnish contributions of  
18 money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."  
19 *Janus*, 138 S.Ct. at 2464 (quoting *A Bill for Establishing Religious Freedom*, in 2 Papers of Thomas  
20 Jefferson 545 (J. Boyd ed. 1950)).

21 111. In *Janus*, the Supreme Court examined the case of compelled subsidization of private  
22 speech. The Court never determined if the courts are to use strict scrutiny or exacting scrutiny  
23 because in *Janus* the Court concluded that the "Illinois scheme cannot survive under even the more  
24 permissive standard." *Id.* at 2465.

25 112. Furthermore, the Defendants may not require Plaintiffs to pay fees to nonprofits when  
26 those fees are going to be used to fund activities of ideological or political nature, such as endorsing  
27 gun control. *See Keller*, 496 U.S. at 13.

28 113. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm  
to their constitutional rights unless Defendants are enjoined from implementing and enforcing the

Ordinance.

114. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled preliminary and permanent injunctive relief invalidating and restraining enforcement of the Ordinance, as well as declaratory relief.

115. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

### THIRD CLAIM FOR RELIEF

#### **Violation of article XI, §7 of the California Constitution-Field Preemption** *The Ordinance occupies a field already occupied by California law.*

116. Plaintiffs incorporate by reference and re-allege herein each of the Paragraphs set forth above.

117. Article XI, section 7 of the California Constitution states that "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

118. The State of California has voluminous statutes comprehensively regulating firearm ownership in California. *See generally* CAL. PENAL CODE §§ 23500-34370. California courts have already determined that "the Legislature intended to occupy the field of residential handgun possession to the exclusion of local government entities." *Fiscal*, 158 Cal.App.4th at 909 (citing Cal. Penal Code § 12026).<sup>1</sup>

119. Accordingly, because the state legislature has already occupied the field of regulating residential handgun possession, as well as all conceivable fields of gun possession, local governments are excluded from further regulation of guns, particularly guns in the home.

120. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing the Ordinance.

<sup>1</sup> The state laws cited in *Fiscal* have since been repealed. However, they have been continued into other statutes with no substantive change.

121. Plaintiffs have found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees and costs pursuant to California Code of Civil Procedure Section 1021.5.

#### FOURTH CLAIM FOR RELIEF

##### **Violation of article XIII C, §1 of the California Constitution-Local Tax Elections** ***The Ordinance imposes new taxes, but was not submitted to the electorate for vote.***

122. Plaintiffs incorporate by reference and re-allege herein each of the Paragraphs set forth above.

123. The California Constitution requires that "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote." Article XIII C, §2(b).

124. It also requires that "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." Article XIII C, §2(d).

125. A "tax" is "any levy, charge, or exaction of any kind imposed by a local government," with exceptions that do not apply here. Article XIII C, §1(e).

126. Thus, both of the fees in the Ordinance and the insurance requirement constitute a "tax."

127. The Ordinance, whether it is a general or a special tax, was never submitted to the electorate for a vote.

128. We note that, if the City disputes that the Ordinance is a tax, "the [City] bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." Article XIII C, §1.

129. The City cannot meet this burden because the fees imposed are a levy, charge, or exaction imposed by the city that does not meet any exception, and the amount of the fees are "more

1 than necessary to cover the reasonable costs of the governmental activity” because they are not for  
 2 government activity, and “the manner in which those costs are allocated to” gun owners do not “bear a  
 3 fair or reasonable relationship to the payor’s burdens on, or benefits received from” the City’s  
 4 “governmental activity.” Article XIII C, §1.

5 130. As stated previously, the insurance requirement and the fee allocated to a nonprofit do  
 6 not cover “costs of a governmental activity” as the insurance is allocated to for-profit corporations and  
 7 the fee is allocated to an unnamed nonprofit rather than the City.

8 131. Neither the insurance requirement nor the nonprofit fees bear a fair or reasonable  
 9 relationship to the payor’s burdens on, or benefits received from, a governmental activity.

10 132. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm  
 11 to their constitutional rights unless Defendants are enjoined from implementing and enforcing the  
 12 Ordinance.

13 133. Plaintiffs have found it necessary to engage the services of private counsel to vindicate  
 14 their rights under the law. Plaintiffs are therefore entitled to an award of attorneys’ fees and costs  
 15 pursuant to California Code of Civil Procedure Section 1021.5.

#### 16 **FIFTH CLAIM FOR RELIEF**

17 **San Jose City Charter, Art. IV, §§ 400, 502, 602, 701, 1204, 1206, 1207, 1211**  
 18 ***The Ordinance Violates the Separation of Powers Within the City of San Jose’s Government, its***  
 19 ***Budget and Appropriations Procedures, and Controls on the City’s Receipts.***

20 134. Plaintiffs incorporate by reference and re-allege herein each of the Paragraphs set forth  
 21 above.

22 135. The San Jose City Charter (“Charter”) establishes the powers of the City of San Jose’s  
 23 government. San Jose City Charter § 200 (Ex. A).

24 136. The Charter divides the legislative power of the City’s government from its executive  
 25 power. “All powers of the City and the determination of all matters of policy shall be vested in the  
 26 Council, subject to the provisions of this Charter and the Constitution of the State of California.” *Id.*, §  
 27 400.

28 137. The Charter grants the City Council the power to impose taxes by ordinance. *Id.*, §



1 602(c).

2 138. Only the City Council has the power to establish a budget. *Id.* §§ 1204, 1206. The  
3 Council also has the sole power to appropriate the expenditure of City funds. *Id.*, § 1207.

4 139. The City Manager is the “Chief Administrative Officer and head of the administrative  
5 branch of the City government.” *Id.*, § 502; *see also id.*, § 701.

6 140. Finally, “[a]ll revenues and receipts which are not required by [the] Charter, State law  
7 or ordinances to be placed in special funds shall be credited to the [City’s] General Fund.” *Id.*, § 1211.  
8 The General Fund is “a medium of control and accounting for all City activities excepting activities  
9 for which special funds are established and maintained.” *Id.* CAL. GOV’T. CODE § 43400 also requires  
10 monies received “from licenses, street poll taxes, fines, penalties, and forfeitures” to be put into the  
11 general fund.

12 141. Here, the Ordinance states that “[t]he City shall not specifically direct how the monies  
13 from the Gun Harm Reduction Fee are expended” by its chosen nonprofit. Ordinance, § 10.32.220.C.

14 142. The Ordinance, by prohibiting the City from directing how “monies from the Gun  
15 Harm Reduction Fee are expended” violates the San Jose City Charter’s reservation of budgeting and  
16 appropriation power to the City Council.

17 143. The Ordinance also violates the City Charter’s delegation of executive functions to the  
18 “administrative” branch of the City Government under the leadership and control of the City Manager  
19 because the Ordinance says “the City shall not specifically direct how the monies from the Gun Harm  
20 Reduction Fee are expended” other than a vague directions to the nonprofit to “reduce the risk” of  
21 harm from using firearms, “mitigate the risk” of harm or liability from possessing firearms, and to  
22 spend the city’s funds in ways including, *but not limited to*, various services. *Id.*, § 10.32.220.A, C.

23 144. The Ordinance states that gun owners must pay the City-required, City-determined fee  
24 directly to a nonprofit organization. *Id.*, § 10.32.215. By diverting the payment of the City’s  
25 mandatory fee directly to a nonprofit rather than the City’s General Fund, the Ordinance violates the  
26 City Charter’s requirement that all City revenues and receipts be deposited into City accounts as an  
27 essential means of City “control and accounting.”

28 145. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm

1 to their constitutional rights unless Defendants are enjoined from implementing and enforcing the  
2 Ordinance.

3 146. Plaintiffs have found it necessary to engage the services of private counsel to vindicate  
4 their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees and costs  
5 pursuant to California Code of Civil Procedure Section 1021.5.

6 **SIXTH CLAIM FOR RELIEF**  
7 **Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202**  
8 ***Plaintiffs are entitled to declaratory relief.***

9 147. Plaintiffs incorporate by reference and re-allege herein each of the Paragraphs set forth  
10 above.

11 148. To the extent that each of the claims above have not already established a remedy,  
12 Plaintiffs are entitled to declaratory relief holding that the Ordinance violates Plaintiffs' individual  
13 rights under the United States and California constitutions and San Jose's City Charter, and is  
14 otherwise invalid, are entitled to preliminary and permanent injunctions preventing the enforcement of  
15 the Ordinance, nominal damages, and further relief that this Court deems necessary or proper.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiffs pray, on behalf of themselves and all of NAGR's members, for the  
18 following:

- 19 A. Preliminary and permanent injunctions enjoining Defendants and all successors in  
20 office from enforcing the Ordinance, including those authorized by 42 U.S.C. § 1983  
21 and Cal. Civil Code §52.1;
- 22 B. A declaratory judgment that the Ordinance violates the First, Second, and Fourteenth  
23 Amendments of the United States Constitution and article XI, section 7 and article XIII  
24 C of the California Constitution, San Jose's City Charter, and granting the necessary  
25 and proper relief this Court deems appropriate, including relief authorized by 28 U.S.C.  
26 §§ 2201, 2202;
- 27 C. Nominal damages;
- 28 D. Costs and attorneys' fees, including those authorized by 42 U.S.C. § 1988 and  
California Code of Civil Procedure Section 1021.5; and

1 E. Any other relief as this Court, in its discretion, deems just and appropriate.

2  
3 Dated: February 14, 2022

DHILLON LAW GROUP INC.

4  
5 By: /s/ Harmeet K. Dhillon

6 Harmeet K. Dhillon

7 Michael A. Columbo

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# **Exhibit 2**

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*Attorneys for Defendant City of San Jose*

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

**Howard Jarvis Taxpayers Association;**  
Silicon Valley Taxpayers Association, Inc.;  
Silicon Valley Public Accountability Foundation;  
James Barry; and George Arrington,

Plaintiffs,

v.

**City of San Jose**, and all persons interested in the  
matter of San Jose Ordinance No. 30716,  
establishing an Annual Gun Harm Reduction Fee,

Defendants.

Case No. \_\_\_\_\_

**NOTICE OF REMOVAL**

[28 U.S.C. §§ 1331, 1367, 1441, 1446]

Complaint filed: March 7, 2022  
Complaint served: March 16, 2022  
Removal date: April 15, 2022

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C §§ 1331, 1367, 1441, and 1446, Defendant City of San Jose (“City”) hereby removes the above-captioned action from the Santa Clara County Superior Court to the United States District Court for the Northern District of California. In support of this Notice of Removal, the City states as follows.

## **I. INTRODUCTION**

1. On March 7, 2022, Plaintiffs Howard Jarvis Taxpayers Association, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation, James Barry, and George Arrington (collectively, “Plaintiffs”) commenced this action against the City in the Santa Clara County Superior Court, assigned Case No. 22CV395596, with the filing of a complaint titled “Complaint to Invalidate §§ 10.32.215 and 10.32.230(B) of Chapter 10.32 of the Title 10 of the San Jose Municipal Code” (“Complaint”), a copy of which is attached here as **Exhibit A**.

2. A copy of the state court docket sheet for this action, downloaded from the Santa Clara County Superior Court within 24 hours of the date and time this Notice of Removal is being filed, is attached here as **Exhibit B**.

3. The Complaint brings four causes of action: **(1)** “Violation of Constitutional Rights of Speech and Association” (under the First and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 2 and 3 of the California Constitution, *see* Compl. ¶ 17); **(2)** “Unconstitutional Condition” (under the Second Amendment to the U.S. Constitution and Article I, Section 1 of the California Constitution, *see id.* ¶ 21); **(3)** “Special Tax Lacking Voter Approval” (under Article XIII C, Sections 1 and 2 of the California Constitution, *see id.* ¶¶ 27, 29-30); and **(4)** “Unconstitutional Delegation of Power to Tax” (under Article XI, Section 11, and Article XIII, Section 31 of the California Constitution, *see id.* ¶ 36).

## **II. JURISDICTION AND BASIS FOR REMOVAL**

4. Removal jurisdiction exists in this matter under 28 U.S.C. §§ 1441(a) and 1446(a) because this case is a “civil action brought in a State court of which the district courts of the United States have original jurisdiction.” 28 U.S.C. § 1441(a).

1           5.       This Court has original jurisdiction under 28 U.S.C. § 1331 with respect to Plaintiffs’  
2 claims that certain provisions of a City Ordinance violate their rights arising under federal law—  
3 namely, the First and Second Amendments to the U.S. Constitution, as applied to the City through the  
4 Fourteenth Amendment. *See* Compl. ¶¶ 17, 19, 21.

5           6.       This Court has supplemental jurisdiction under 28 U.S.C § 1367 with respect to  
6 Plaintiffs’ other claims, which arise under California state law, because those other claims regard the  
7 same provisions of the same City Ordinance and are otherwise “so related to claims in the action within  
8 [the Court’s] original jurisdiction that they form part of the same case or controversy under Article III  
9 of the United States Constitution.” 28 U.S.C. § 1367.

### 10 **III. VENUE AND INTRADISTRICT ASSIGNMENT**

11           7.       Removal to this Court is proper under 28 U.S.C. §§ 84(a), 1441(a), and 1446(a) because  
12 Santa Clara County Superior Court, where the Complaint was filed, is a state court within the Northern  
13 District of California.

14           8.       Pursuant to Northern District of California Civil Local Civil Rule 3-2(c) and (e), this  
15 case should be assigned to the San Jose Division, as the alleged events giving rise to the action  
16 occurred in San Jose and concern the City of San Jose and its residents. *See* Compl. ¶¶ 4-6, 9, 19.

### 17 **IV. PROCEDURAL REQUIREMENTS**

18           9.       Plaintiffs served the City on March 16, 2022. *See* **Exhibit C** (Proof of Service). This  
19 Notice of Removal is being filed within 30 days of service, in accordance with 28 U.S.C § 1446(b).

20           10.      “[A] copy of all process, pleadings, and orders” served upon the removing defendant  
21 (i.e., the City) in this action are attached here as **Exhibit D**, in accordance with 28 U.S.C § 1446(a).

22           11.      A copy of this Notice of Removal is being filed with the Clerk of the Santa Clara  
23 County Superior Court and is being served on all adverse parties, through their counsel of record, in  
24 accordance with 28 U.S.C. § 1446(d).

25           12.      “[A]ll defendants who have been properly joined and served” have joined or consented  
26 to the removal of this action, in accordance with 28 U.S.C. § 1446(b)(2)(A). The City is the only  
27 defendant that has been “properly joined and served” in this action for purposes of Section



1 1446(b)(2)(A). While the Complaint also names as defendants “all persons interested in the matter of  
2 San Jose Ordinance No. 30716” (Compl. ¶ 7), all such persons are nominal or unknown, and none of  
3 them are “defendants who have been properly joined and served” for purposes of the federal removal  
4 statute. *See Baker v. Wells Fargo Bank, N.A.*, No. 1:16-cv-01943, 2017 WL 931879, at \*3 (E.D. Cal.  
5 Mar. 9, 2017) (“the general requirement of consent does not apply to ‘nominal, unknown, or  
6 fraudulently joined parties’”).

7 **V. CONCLUSION**

8 WHEREFORE, pursuant to 28 U.S.C. §§ 1331, 1367, 1441, and 1446, Defendant City of San  
9 Jose hereby removes this action from the Santa Clara County Superior Court to the United States  
10 District Court for the Northern District of California.

11  
12 Respectfully submitted,

13 Dated: April 15, 2022

**COTCHETT, PITRE & McCARTHY, LLP**

14  
15 By: /s/ Tamarah P. Prevost

16 Joseph W. Cotchett

17 Tamarah P. Prevost

18 Andrew F. Kirtley

19 Melissa Montenegro

20 *Attorneys for Defendant City of San Jose*

# Exhibit A

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County of Santa Clara  
22CV395596  
Reviewed By: A. Villanueva

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA CLARA**

HOWARD JARVIS TAXPAYERS ASSN.,  
SILICON VALLEY TAXPAYERS ASSN.,  
SILICON VALLEY PUBLIC ACCOUNTA-  
BILITY FOUNDATION, JAMES BARRY,  
and GEORGE ARRINGTON,

Plaintiffs

v.

CITY OF SAN JOSE, and ALL PERSONS  
INTERESTED in the matter of San Jose  
Ordinance No. 30716, establishing an  
Annual Gun Harm Reduction Fee,

Defendants

No. 22CV395596

**COMPLAINT TO INVALIDATE  
§§ 10.32.215 AND 10.32.230(B) OF  
CHAPTER 10.32 OF TITLE 10 OF THE  
SAN JOSE MUNICIPAL CODE**

**Calendar preference per CCP § 867**

**PARTIES**

1  
2 1. Plaintiff Howard Jarvis Taxpayers Association (“HJTA”) is a nonprofit public  
3 benefit corporation, comprised of over 200,000 California members, organized and  
4 existing under the laws of California for the purpose, among others, of engaging in civil  
5 litigation on behalf of its members and all California taxpayers to ensure constitutionality  
6 in taxation. HJTA has members who reside in the City of San Jose, who legally own  
7 firearms, and who are subject to the Annual Gun Harm Reduction Fee that is the  
8 subject of this action.

9 2. Plaintiff Silicon Valley Taxpayers Association, Inc. (“SVTA”) is a nonprofit  
10 public benefit corporation, comprised of members who reside in Santa Clara County,  
11 organized and existing under the laws of California for the purpose of advocating the  
12 reduction of taxes and acting on behalf of its members to achieve its tax reduction  
13 goals. SVTA has members who reside in the City of San Jose, who legally own  
14 firearms, and who are subject to the Annual Gun Harm Reduction Fee that is the  
15 subject of this action.

16 3. Plaintiff Silicon Valley Public Accountability Foundation (“SVPAF”) is a  
17 nonprofit public benefit corporation, comprised of members who reside in Santa Clara  
18 County, organized and existing under the laws of California for the purpose of  
19 monitoring the policies and political actions of public officials in Santa Clara County to  
20 keep voters informed and residents represented in local decision-making. SVPAF has  
21 members who reside in the City of San Jose, who legally own firearms, and who are  
22 subject to the Annual Gun Harm Reduction Fee that is the subject of this action.

23 4. Plaintiff James Barry is a resident of San Jose who legally owns a firearm  
24 and is subject to the Annual Gun Harm Reduction Fee that is the subject of this action.

25 5. Plaintiff George Arrington is a resident of San Jose who legally owns a  
26 firearm and is subject to the Annual Gun Harm Reduction Fee that is the subject of this  
27 action.

6. Defendant City of San Jose ("City") is a charter city located in Santa Clara County. The Annual Gun Harm Reduction Fee that is the subject of this action is a law of the City, which the City is responsible for enforcing. The City can sue and be sued under Government Code § 34501.

7. The remaining defendants are all persons interested in the matter of San Jose Ordinance No. 30716, establishing an Annual Gun Harm Reduction Fee.

### **JURISDICTION AND CALENDAR PREFERENCE**

8. Plaintiffs bring this action under the validation statutes (Code of Civ. Proc. §§ 860, et seq.) because plaintiffs allege that the challenged Gun Harm Reduction Fee is a special tax, albeit not voter approved (see Gov. Code § 50077.5), and because defendant City may have already entered into a contract with a designated nonprofit organization (see Gov. Code § 53511). Jurisdiction will be established by personal service upon the City's representative and publication of the summons in a newspaper of general circulation within the City of San Jose as required by the validation statutes. The action is entitled to calendar preference over all other civil matters under Code of Civil Procedure section 867.

### **FIRST CAUSE OF ACTION**

#### **(Violation of Constitutional Rights of Speech and Association)**

9. Ordinance No. 30716 was passed into law by the City Council of the City of San Jose on or about February 8, 2022. Ordinance No. 30716 added Part 6 to Chapter 10.32 of Title 10 of the San Jose Municipal Code, entitled "Reduction of Gun Harm – Liability Insurance Requirement and Gun Harm Reduction Fee" (hereafter "the Ordinance").

10. The Ordinance requires any San Jose resident who owns a firearm to "obtain and continuously maintain in full force and effect a homeowner's, renter's or gun liability insurance policy ... specifically covering losses or damages resulting from any accidental use of the Firearm." (San Jose Muni. Code § 10.32.210(A).) This

1 requirement of the Ordinance is not challenged herein.

2 11. The Ordinance also requires San Jose gun owners to pay an “Annual Gun  
3 Harm Reduction Fee” to a “Designated Nonprofit Organization” that the City Manager  
4 will designate from time to time. The amount of the annual fee “will be set forth in the  
5 schedule of fees and charges established by resolution of the City Council.” (Muni.  
6 Code § 10.32.215.) It is this fee that plaintiffs challenge herein.

7 12. “Designated Nonprofit Organization” is defined in the Ordinance as “an  
8 entity that qualifies as a nonprofit corporation under the federal internal revenue code  
9 and is designated pursuant to the City Manager’s authority under Section 10.32.235,”  
10 provided that “[n]o City official or employee shall sit on the board of directors of the  
11 Designated Nonprofit Organization.” (Muni. Code § 10.32.205(B).) Section 10.32.235,  
12 in subdivision (A)(2), delegates authority to the City Manager for “[d]esignation of the  
13 nonprofit organization that will receive the Gun Harm Reduction Fee.”

14 13. The Ordinance provides basic guidelines for expenditure of the fee by the  
15 nonprofit organization. It says, “expenditures may include, but are not necessarily  
16 limited to the following: (1) Suicide prevention services or programs; (2) Violence  
17 reduction or gender based violence services or programs; (3) Addiction intervention and  
18 substance abuse treatment; (4) Mental health services related to gun violence; or (5)  
19 Firearms safety education or training.” (Muni. Code § 10.32.220(A).)

20 14. The Ordinance further states, “The Designated Nonprofit Organization shall  
21 spend every dollar generated from the Gun Harm Reduction Fee, minus administrative  
22 expenses, exclusively for programs and initiatives designed to (a) reduce the risk or  
23 likelihood of harm from the use of firearms in the City of San Jose, and (b) mitigate the  
24 risk of physical harm or financial, civil, or criminal liability that a San Jose firearm owner  
25 or her family will incur through her possession of firearms.” (Muni. Code §  
26 10.32.220(C).)

27 15. Except for these basic guidelines, the Ordinance provides that “the City

1 shall not specifically direct how the monies from the Gun Harm Reduction Fee are  
2 expended.” (Muni. Code § 10.32.220(C).)

3 16. A gun owner’s failure to pay the required fee to the designated private  
4 organization is punishable by a fine (Muni. Code § 10.32.240(A)) and confiscation of  
5 the owner’s firearms (Muni. Code § 10.32.245).

6 17. The First Amendment of the United States Constitution, made applicable to  
7 the states through the Fourteenth Amendment, provides, “Congress shall make no law  
8 ... abridging the freedom of speech ... or the right of the people peaceably to  
9 assemble.” Article I, sections 2 and 3 of the California Constitution provide, “A law may  
10 not restrain or abridge liberty of speech,” and “The people have the right to ... assemble  
11 freely to consult for the common good.”

12 18. Liberty of speech includes the right to not speak and the right to not be  
13 forced by the government to support someone else’s speech, particularly when you  
14 disagree with their message. The right to assemble freely includes the right to  
15 associate with others around a common cause and the right to not be forced by the  
16 government to associate with or support someone else’s organization, particularly a  
17 group with which you would not voluntarily assemble.

18 19. By requiring San Jose gun owners to pay an Annual Gun Harm Reduction  
19 Fee to a private nonprofit organization that the City Manager will designate, the  
20 Ordinance forces San Jose gun owners to associate with or support that private group  
21 and to fund their message, in violation of the gun owners’ rights of free speech and  
22 association under the United States and California constitutions.

23 WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

24 **SECOND CAUSE OF ACTION**

25 **(Unconstitutional Condition)**

26 20. Plaintiffs repeat the allegations contained in Paragraphs 1 through 19  
27 above as though fully set forth herein.



21. The Second Amendment of the United States Constitution provides, “the right of the people to keep and bear arms, shall not be infringed.” Article I, section 1 of the California Constitution provides that “All people ... have inalienable rights” among which are the rights of “protecting property, and pursuing and obtaining safety.”

22. Plaintiff gun owners wish to continue exercising their rights under the United States and California constitutions to protect their property and personal safety by keeping and bearing arms. However, the Ordinance has placed a condition on the continued exercise of those rights: any gun owner who fails to pay the required fee to the designated private organization may be forced to surrender his firearms to the City. (Muni. Code § 10.32.245.)

23. Plaintiff gun owners’ constitutional rights are “inalienable.” They are not rights granted by the City of San Jose that can be withheld or revoked by the City if gun owners do not comply with conditions contrived by the City.

WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

### THIRD CAUSE OF ACTION

#### (Special Tax Lacking Voter Approval)

24. Plaintiffs repeat the allegations contained in Paragraphs 1 through 23 above as though fully set forth herein.

25. The Annual Gun Harm Reduction Fee is imposed by the City of San Jose.

26. The Annual Gun Harm Reduction Fee is a compulsory exaction.

27. Article XIII C, section 1(e) of the California Constitution defines a “tax” as “any levy, charge, or exaction of any kind imposed by a local government” unless it fits one of seven limited exceptions.

28. Although labeled a “fee” by the City, the Annual Gun Harm Reduction Fee does not qualify for any exception from the definition of a “tax” enumerated in article XIII C, section 1(e). Therefore it is a tax.

29. Taxes are either “general taxes” or “special taxes.” A “special tax” is “any

1 tax imposed for specific purposes.” (Cal. Const., art. XIII C, § 1(d).) The Annual Gun  
 2 Harm Reduction Fee is imposed ostensibly for the purpose of reducing gun harm.  
 3 Therefore, it is a special tax.

4 30. Article XIII C, section 2(d) of the California Constitution provides, “No local  
 5 government may impose, extend, or increase any special tax unless and until that tax is  
 6 submitted to the electorate and approved by a two-thirds vote.”

7 31. The Annual Gun Harm Reduction Fee was not submitted to the electorate  
 8 or approved by a two-thirds vote.

9 WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

#### 10 **FOURTH CAUSE OF ACTION**

##### 11 **(Unconstitutional Delegation of Power to Tax)**

12 32. Plaintiffs repeat the allegations contained in Paragraphs 1 through 31  
 13 above as though fully set forth herein.

14 33. Only the government possesses the power to tax.

15 34. The power to tax includes the power to collect taxes and appropriate tax  
 16 revenues.

17 35. Under the Ordinance, the Annual Gun Harm Reduction Fee will be collected  
 18 by the private nonprofit organization that the City Manager will designate. That revenue  
 19 will not be remitted to the City, but will be appropriated by the private organization. San  
 20 Jose Municipal Code section 10.32.220(C) states, “The Designated Nonprofit  
 21 Organization shall spend every dollar generated from the Gun Harm Reduction Fee,”  
 22 and “the City shall not specifically direct how the monies from the Gun Harm Reduction  
 23 Fee are expended.”

24 36. Under article XIII, section 31 of the California Constitution, the power to tax  
 25 may not be granted to a private entity. It provides, “The power to tax may not be  
 26 surrendered or suspended by grant or contract.” Similarly, article XI, section 11  
 27 prohibits the delegation of local powers to private entities. It prohibits “delegat[ing] to a

1 private person or body power to make, control, appropriate, supervise, or interfere with  
2 county or municipal corporation improvements, money, or property, or to levy taxes or  
3 assessments, or perform municipal functions."

4 37. The Ordinance unconstitutionally delegates some of the City's power to tax  
5 and appropriate tax revenues to a private organization, not answerable to the voters,  
6 that the City Manager will designate.

7 WHEREFORE, plaintiffs pray for judgment as set forth below:

8 **PRAYER**


9 Based on the foregoing allegations, plaintiffs pray for judgment against  
10 defendants as follows:

- 11 1. For an Order invalidating sections 10.32.215 and 10.32.230(B) of chapter  
12 10.32 of title 10 of the San Jose Municipal Code;  
13 2. For costs of suit including reasonable attorney fees; and  
14 3. For such other or further relief as the Court deems just and proper.

15 DATED: March 7, 2022.

16 Respectfully submitted,

17 JONATHAN M. COUPAL  
18 TIMOTHY A. BITTLE  
19 LAURA E. DOUGHERTY

20 

21 TIMOTHY A. BITTLE  
22 Attorneys for Plaintiffs  
23  
24  
25  
26  
27

**VERIFICATION**

I, Timothy A. Bittle, am the Director of Legal Affairs for the Howard Jarvis Taxpayers Association, one of the plaintiffs in this action, and authorized to sign this Verification on the Association's behalf. The other plaintiffs are absent from the County of Sacramento where I have my office, and I make this verification for that reason as well.

I have read the attached complaint. Except as to matters stated on information and belief, the allegations contained in the complaint are true of my own knowledge and, with regard to those matters stated on information and belief, I believe them to be true.

I declare, upon penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this verification was executed on the date shown below in the City of Sacramento, California.

DATED: March 7, 2022.

  
TIMOTHY A. BITTLE

# Exhibit B

**22CV395596**

Print

**Howard Jarvis Taxpayers Association et al vs All Persons Interested in the matter of San Jose Ordinance No. 30716, et al****Case Information**

**Case Type:** Other Complaint (Not Spec)  
Unlimited (42)  
**Case Number:** 22CV395596  
**Filing Date:** 3/7/2022  
**Case Status:** Active  
**Court Location:** Civil

**PARTIES****EVENTS****HEARINGS**

Show All entries

Search: 

Type	First Name	Middle Name	Last Name
Defendant			All Persons Interested in the matter of San Jose Ordinance No. 30716,
Defendant			City of San Jose
Plaintiff			Howard Jarvis Taxpayers Association
Plaintiff	James		Barry
Plaintiff	George		Arrington
Plaintiff			Silicon Valley Taxpayers Association
Plaintiff			Silicon Valley Public Accountability Foundation

Showing 1 to 7 of 7 entries

Previous **1** Next**Attorneys**

Show All entries

Search: 

Representing	First Name	Middle Name	Last Name
Howard Jarvis Taxpayers Association	Timothy	Arthur	Bittle
Silicon Valley Public Accountability Foundation	Timothy	Arthur	Bittle
Silicon Valley Taxpayers Association	Timothy	Arthur	Bittle
George Arrington	Timothy	Arthur	Bittle
James Barry	Timothy	Arthur	Bittle

Showing 1 to 5 of 5 entries

Previous **1** Next








Show All entries

Search: 

File Date	File Type	Filed By	Comment	Documents
4/14/2022	Proof of Service: Summons DLR (Civil)	Howard Jarvis Taxpayers Association, James Barry, George Arrington, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation,	Proof of Published Service of Summons on "All Persons Interested"	
3/25/2022	Order: Ex Parte	Timothy Bittle, Howard Jarvis Taxpayers Association, James Barry, George Arrington, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation,	GRANTED Order Approving Publication of Summons	
3/24/2022	Proof of Service	Timothy Bittle, Howard Jarvis Taxpayers Association, James Barry, George Arrington, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation,		

**SER-124**

Case 5:25-cv-02315 Document 140 Filed 04/15/25 Page 18 of 74

File Date	File Type	Filed By	Comment	Documents
3/24/2022	Ex Parte Application - Notice Required	Timothy Bittle, Howard Jarvis Taxpayers Association, James Barry, George Arrington, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation,	for Order Approving Publication of Summons; Declaration of Timothy Bittle; Memorandum of Points and Authorities	
3/22/2022	Opposition/Objections	City of San Jose,	to Ex Parte Application for Order Approving Publication of Summons	
3/22/2022	Request: Judicial Notice	City of San Jose,	In Support of Opposition to Ex Parte Application for Order Approving Publication of Summons	
3/18/2022	Proof of Service: Summons DLR (Civil)	Howard Jarvis Taxpayers Association, James Barry, George Arrington, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation,	Proof of Service of Summons	
3/7/2022	New Filed Case			
3/7/2022	Complaint (Unlimited) (Fee Applies)	Howard Jarvis Taxpayers Association, James Barry, George Arrington, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation,	Complaint to Invalidate Sections 10.32.215 and 10.32.230(B) of Chapter 10.32 of Title 10 of the San Jose Municipal Code	
3/7/2022	Civil Case Cover Sheet	Howard Jarvis Taxpayers Association, James Barry, George Arrington, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation,	Civil Case Cover Sheet	
3/7/2022	Summons: Issued/Filed	Howard Jarvis Taxpayers Association, James Barry, George Arrington, Silicon Valley Taxpayers Association, Silicon Valley Public Accountability Foundation,	Summons	

Showing 1 to 11 of 11 entries

Previous 1 Next

Show All ▾ entries

Search: 

Department	Type	Date	Time	Result
Department 20	Conference: Case Management	8/2/2022	3:00PM	

Showing 1 to 1 of 1 entries

Previous 1 Next



# Exhibit C

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): <b>Timothy Bittle, 112300</b> Howard Jarvis Taxpayers Foundation 921 11th Street, Suite 1201 Sacramento, CA 95814 TELEPHONE NO.: (916) 444-9950 ATTORNEY FOR (Name): Plaintiff	FOR COURT USE ONLY R. Fleming  <b>Electronically Filed          by Superior Court of CA,          County of Santa Clara,          on 3/18/2022 11:25 AM          Reviewed By: R. Fleming          Case #22CV395596          Envelope: 8543660</b>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> Superior Court of California, Santa Clara County 191 N. First Street San Jose, CA 95113-1090	
PLAINTIFF/PETITIONER: Howard Jarvis Taxpayers Assn., et al.  DEFENDANT/RESPONDENT: City of San Jose, et al.	CASE NUMBER:  22CV395596
<b>PROOF OF SERVICE OF SUMMONS</b>	Ref. No. or File No.:

1. At the time of service I was a citizen of the United States, at least 18 years of age and not a party to this action.
2. I served copies of: Summons, Complaint, Alternative Dispute Information Sheet

3. a. Party served: City of San Jose

b. Person Served: Office of the City Clerk - Person Authorized to Accept Service of Process

4. Address where the party was served: 200 E Santa Clara St, Tower 14th Floor  
San Jose, CA 95113

5. I served the party

b. **by substituted service.** On (date): 03/16/2022 at (time): 1:58PM I left the documents listed in item 2 with or in the presence of: Toni Taber - Deputy City Clerk - Person In Charge Of Office

(1) (business) a person at least 18 years of age apparently in charge at the office or usual place of business of the person to be served. I informed him or her of the general nature of the papers.

(4) A declaration of mailing is attached.

6. The "Notice to the Person Served" (on the summons) was completed as follows:

d. on behalf of:  
City of San Jose

under: CCP 416.50 (public entity)

7. **Person who served papers**

a. Name: Joseph Hussey  
b. Address: One Legal - P-000618-Sonoma  
1400 North McDowell Blvd, Ste 300  
Petaluma, CA 94954

c. Telephone number: 415-491-0606

d. The fee for service was: \$ 153.00

e. I am:

- (3) registered California process server.  
 (i) Employee or independent contractor.  
 (ii) Registration No. ps1611  
 (iii) County Santa Clara

8. I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Date: 03/16/2022

Joseph Hussey

(NAME OF PERSON WHO SERVED PAPERS)



(SIGNATURE)

Case 5:22-cv-02385-Document 140-3 Filed 04/15/23 Page 17 of 74

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): Timothy Bittle, 112300 Howard Jarvis Taxpayers Foundation 921 11th Street, Suite 1201 Sacramento, CA 95814 ATTORNEY FOR (Name): <b>Plaintiff</b>		TELEPHONE NO.: (916) 444-9950	FOR COURT USE ONLY	
Ref. No. or File No.				
Insert name of court, judicial district or branch court, if any:  Santa Clara - First Street 191 N. First Street San Jose, CA 95113-1090				
PLAINTIFF: Howard Jarvis Taxpayers Assn., et al.				
DEFENDANT: City of San Jose, et al.				
<b>PROOF OF SERVICE BY MAIL</b>			CASE NUMBER: 22CV395596	

I am a citizen of the United States, over the age of 18 and not a party to the within action. My business address is 1400 N. McDowell Blvd, Petaluma, CA 94954.

On 03/17/2022, after substituted service under section CCP 415.20(a) or 415.20(b) or FRCP 4(e)(2)(B) or FRCP 4(h)(1)(B) was made (if applicable), I mailed copies of the:

Summons, Complaint, Alternative Dispute Information Sheet

to the person to be served at the place where the copies were left by placing a true copy thereof enclosed in a sealed envelope, with First Class postage thereon fully prepaid, in the United States Mail at Petaluma, California, addressed as follows:

City of San Jose

Office of the City Clerk (or authorized staff)

200 E Santa Clara St, Tower 14th Floor

San Jose, CA 95113

I am readily familiar with the firm's practice for collection and processing of documents for mailing. Under that practice, it would be deposited within the United States Postal Service, on that same day, with postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

Fee for Service: \$ 153.00

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on 03/17/2022 at Petaluma, California.

One Legal - P-000618-Sonoma  
1400 North McDowell Blvd, Ste 300  
Petaluma, CA 94954

*MBerry*

Melissa Berry

OL# 17868464

**SER-128**

# Exhibit D

1 JONATHAN M. COUPAL, State Bar No. 107815  
 2 TIMOTHY A. BITTLE, State Bar No. 112300  
 3 LAURA E. DOUGHERTY, State Bar No. 255855  
 4 Howard Jarvis Taxpayers Foundation  
 5 921 Eleventh Street, Suite 1201  
 6 Sacramento, CA 95814  
 7 (916) 444-9950  
 8 Email: tim@hjta.org

9 Attorneys for Plaintiffs

**FILED**  
 MAR 23 2022  
 Clerk of the Court  
 Superior Court of CA County of Santa Clara  
 BY R. Sandovar DEPUTY

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
 11 **FOR THE COUNTY OF SANTA CLARA**

12 HOWARD JARVIS TAXPAYERS ASSN., ) No. 22CV395596  
 13 SILICON VALLEY TAXPAYERS ASSN., )  
 14 SILICON VALLEY PUBLIC ACCOUNTA- )  
 15 BILITY FOUNDATION, JIM BARRY, and )  
 16 GEORGE ARRINGTON, )

17 Plaintiffs

18 v.

19 CITY OF SAN JOSE, and ALL PERSONS )  
 20 INTERESTED in the matter of San Jose )  
 21 Ordinance No. 30716, establishing an )  
 22 Annual Gun Harm Reduction Fee, )

23 Defendants

**EX PARTE APPLICATION FOR ORDER  
 APPROVING PUBLICATION OF  
 SUMMONS; DECLARATION OF  
 TIMOTHY BITTLE; MEMORANDUM OF  
 POINTS AND AUTHORITIES**

Department: 20  
 Case Filed: March 7, 2022  
 Trial Date: Not Set

Calendar preference per CCP § 867

**TELEPHONE APPEARANCE**

**EX PARTE APPLICATION**

Plaintiffs Howard Jarvis Taxpayers Association *et al.* hereby apply *ex parte* for an Order approving the form of, and the publication of, summons upon all persons interested in the matter of City of San Jose Ordinance No. 30716, establishing an Annual Gun Harm Reduction Fee.


Plaintiffs have sued the City of San Jose ("City") to invalidate the new gun fee on the grounds that it violates their constitutional rights of free speech and association, places an unconstitutional condition on their right to bear arms, is a special tax which needed 2/3 voter approval, unlawfully delegates governmental taxing power to a private organization, and for these reasons is invalid.

This application is made on the grounds that Government Code sections 50077.5 and 53511 require plaintiffs' lawsuit to be brought as a reverse-validation action against "all persons" under Code of Civil Procedure sections 860 *et seq.* Pursuant to Code of Civil Procedure sections 861, 861.1, and 863, all persons interested must be specially notified through published summons. The proposed form of published summons is attached to the accompanying proposed Order as Exhibit 1. Supporting this Application are the attached (1) Declaration of Timothy Bittle and (2) Memorandum of Points and Authorities.

DATED: March 17, 2022.

Respectfully submitted,

JONATHAN M. COUPAL  
TIMOTHY A. BITTLE  
LAURA E. DOUGHERTY

  
TIMOTHY A. BITTLE  
Attorneys for Plaintiffs

**DECLARATION OF TIMOTHY BITTLE**

I, Timothy Bittle, declare:

1. I am an attorney duly licensed by the State of California, admitted to practice before this Court, and counsel for plaintiffs in this action. I have personal knowledge of the facts to follow and if called as a witness, my testimony would be the same.

2. On March 17, 2022, at approximately 10:00 a.m., I called the San Jose City Attorney's Office, explained that I was calling to give notice of this ex parte application, and asked to speak with the deputy assigned to this case. I was informed that no deputy had yet been assigned, but that I could leave my message with Vada Burrow for City Attorney Nora Frimann. I was connected to Ms. Burrow's voicemail and I left a message that plaintiffs would be depositing this application in the Court's drop box on Monday, March 21, 2022, hoping for a hearing on Thursday, March 24, 2022. Shortly after hanging up, I sent the same message to the City Attorney's email address, cao.main@sanjoseca.gov, attaching a copy of the ex parte papers we would be filing.

3. Absent immediate approval of this ex parte application, plaintiffs will be unable to satisfy the publication and proof of service requirements of the validation statutes (Code of Civ. Proc. §§ 860 *et seq.*). To comply with these statutes, plaintiffs must: (1) arrange to have summons published once a week for three weeks in a newspaper of general circulation for the City of San Jose (Code of Civ. Proc. § 861; Gov. Code § 6063); then (2) obtain proof of publication from the newspaper; and (3) file the proof of publication as proof of service in this court – all within 60 days of the commencement of the action (Code of Civ. Proc. § 863; CRC Rule Rule 3-110(b)).

4. My office consulted the Court's list of newspapers of general circulation available on the Court's website and found that the Mercury News is a newspaper which has been adjudicated as a newspaper of general circulation in the City of San Jose. According to its website, it is the newspaper with the most print and online

1 subscribers in the City of San Jose.

2 I declare upon penalty of perjury under the laws of the State of California that the  
3 foregoing is true and correct and that this declaration was executed this 17<sup>th</sup> day of  
4 March, 2022, in Sacramento, California.

5   
6 TIMOTHY A. BITTLE

7  
8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **STATEMENT OF FACTS**

10 This is a “reverse-validation action” brought under the validation statutes (Code  
11 of Civ. Proc. §§ 860, *et seq.*), which authorize an action to validate or invalidate acts of  
12 local governments. Plaintiffs assert that certain sections of Ordinance No. 30716,  
13 recently enacted by the San Jose City Council, are invalid.

14 The ordinance imposes a new Gun Harm Reduction Fee that all San Jose gun  
15 owners must pay annually to a private nonprofit organization to be designated by the  
16 City Manager. Plaintiffs’ complaint alleges that the new fee violates their constitutional  
17 rights of free speech and association, places an unconstitutional condition on the right  
18 to bear arms, is a special tax which needed 2/3 voter approval, unlawfully delegates  
19 governmental taxing power to a private organization, and for these reasons is invalid.

20 Because this action is brought under the validation statutes, plaintiffs’ complaint  
21 names as defendants: (1) the City of San Jose, and (2) “all persons interested in the matter  
22 of San Jose Ordinance No. 30716, establishing an Annual Gun Harm Reduction Fee.”

23 Plaintiffs submitted their complaint for filing on March 7, 2022. It was processed  
24 for filing and given a case number on March 15, 2022, at which time the clerk also  
25 issued summons for the City.

26 Plaintiffs personally served the complaint and summons on the City via process  
27 server on March 16, 2022. This application to publish summons applies only to



1 unknown potential defendants named as “all persons interested.”

2 Code of Civil Procedure section 861 requires “all persons interested” to be  
3 served via summons published once a week for three weeks in the Legal Notices  
4 section of a newspaper of general circulation in the City of San Jose. Before plaintiffs  
5 can publish summons, however, this Court must approve the form and wording of the  
6 summons, and the proposed newspaper in which it will be published.

7 Because CRC Rule 3-110(b) and Code of Civil Procedure section 863 require  
8 plaintiffs to serve all defendants “within 60 days after the filing of the complaint,” time is  
9 of the essence.

## 10 ARGUMENT

### 11 A. Seeking This Order Ex Parte is Appropriate

12 Government Code section 50077.5 provides that the validation statutes apply “to  
13 any judicial action or proceeding to validate, attack, review, set aside, void, or annul an  
14 ordinance or resolution ... that levies a special tax.” Since plaintiffs’ complaint alleges  
15 that the Annual Gun Harm Reduction Fee constitutes a special tax (albeit not approved  
16 by the voters), Code of Civil Procedure sections 860 *et seq.* apply to this action.

17 Moreover, Government Code section 53511 provides that the validation statutes  
18 apply “to determine the validity of [an agency’s] bonds, warrants, contracts, obligations  
19 or evidences of indebtedness.” The City’s ordinance directs the City Manager to  
20 designate a private nonprofit organization to collect and spend the Annual Gun Harm  
21 Reduction Fee. Because plaintiffs are informed and believe that the City may have  
22 already entered into a contract with a nonprofit organization for this purpose, Code of  
23 Civil Procedure sections 860 *et seq.* apply to this action.

24 Section 861 provides that, “[j]urisdiction of all interested parties may be had by  
25 publication of summons pursuant to Section 6063 of the Government Code in a  
26 newspaper of general circulation designated by the court, published in the county where  
27 the action is pending and whenever possible within the boundaries of the public

agency.” Section 861.1 requires that “[t]he summons shall be directed to ‘all persons interested in the matter of [specifying the matter].’” Government Code section 6063 requires publication once a week for three weeks.

Section 863 provides that, “[i]n any such action the summons shall be in the form prescribed in Section 861.1 except that in addition to being directed to ‘all persons interested in the matter of [specifying the matter],’ it shall also be directed to the public agency. *If the interested person bringing such action fails to complete the publication and such other notice as may be prescribed by the court in accordance with Section 861 and to file proof thereof in the action within 60 days from the filing of his complaint, the action shall be forthwith dismissed.*”

By statute, then, there is insufficient time to request approval of the form of summons and place of publication using a regular noticed motion. Plaintiffs must have time to schedule publication of the summons in the “legal notices” section of the newspaper, allow three weeks for publication, then obtain from the newspaper a “proof of publication” and file it with this court, all within the 60-day time limitation. Otherwise, absent an extension of time, the case will be dismissed.

*B. The Proposed Form of Publication Satisfies the Statute*

Code of Civil Procedure section 861 requires publication in “a newspaper of general circulation ... published in the county where the action is pending and whenever possible within the boundaries of the public agency.”

In this case, the Mercury News has been adjudicated as a newspaper of general circulation within the boundaries of the City of San Jose and is also the newspaper with the largest number of online and print subscribers.

Section 861.1 requires that, “the summons shall be in the form prescribed in Section 412.20.” In a nutshell, section 412.20 requires the summons to include the following:

- (1) The title of the court in which the action is pending.
- (2) The names of the parties to the action.

(3) A direction that, to be heard, the defendant must file a written response to the complaint within the time specified. (Section 861.1, in turn, provides that the time to respond "shall be 10 or more days after the completion of publication of the summons.")

(4) A notice that, unless the defendant so responds, plaintiff may apply for entry of default and the relief sought by the complaint.

(5) The following statement in boldface type: "You may seek the advice of an attorney in any matter connected with the complaint or this summons. Such attorney should be consulted promptly so that your pleading may be filed or entered within the time required by this summons."

(6) The following introductory legend at the top of the summons above all other matter, in boldface type, in English and Spanish: "Notice! You have been sued. The court may decide against you without your being heard unless you respond within [the time specified]. Read the information below."

The proposed form of summons attached as Exhibit 1 to the proposed Order contains all of the information required by section 412.20.

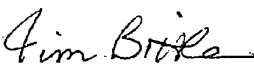
#### CONCLUSION

Due to the time constraints associated with a reverse-validation action, this ex parte application is appropriate. The proposed form of summons (attached to the proposed Order filed herewith), and the proposed newspaper (Mercury News) comply with the requirements of the applicable statutes. For these reasons, plaintiffs' ex parte application for approval should be granted.

DATED: March 17, 2022

Respectfully submitted,

JONATHAN M. COUPAL  
TIMOTHY A. BITTLE  
LAURA E. DOUGHERTY

  
TIMOTHY A. BITTLE  
Attorneys for Plaintiffs

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 5 Email: tim@hjta.org  
 Attorneys for Plaintiffs  
 6  
 7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
 9 **FOR THE COUNTY OF SANTA CLARA**

10 HOWARD JARVIS TAXPAYERS ASSN., ) No. 22CV395596  
 SILICON VALLEY TAXPAYERS ASSN., )  
 11 SILICON VALLEY PUBLIC ACCOUNTA- )  
 BILITY FOUNDATION, JIM BARRY, and )  
 12 GEORGE ARRINGTON, )

13 Plaintiffs )

14 v. )

15 CITY OF SAN JOSE, and ALL PERSONS )  
 INTERESTED in the matter of San Jose )  
 16 Ordinance No. 30716, establishing an )  
 Annual Gun Harm Reduction Fee, )

17 Defendants )

**[PROPOSED] ORDER APPROVING  
 PUBLICATION OF SUMMONS**

Department: 20  
 Case Filed: March 7, 2022  
 Trial Date: Not Set

18 Calendar preference per CCP § 867  
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**ORDER**

On the application of plaintiffs, which was considered \_\_\_\_\_, 2022,  
in Department 20 with notice to counsel for defendant City of San Jose, the Court  
having considered the authorities cited and good cause appearing therefor:

IT IS HEREBY ORDERED that plaintiffs' application for approval to publish  
summons as to All Persons Interested in the matter of San Jose Ordinance No. 30716  
is GRANTED AS FOLLOWS:

1. Plaintiffs shall use the form of Summons attached hereto as Exhibit 1.
2. Plaintiffs shall cause the Summons to be published once a week for three  
consecutive weeks, with at least five days intervening between publication dates, in the  
Legal Notices section of the San Jose Mercury News.
3. Plaintiffs shall obtain Proof of Publication from said newspaper and file it  
with this Court immediately thereafter, or show good cause for their failure to do so.

DATED: \_\_\_\_\_, 2022.

\_\_\_\_\_  
HON. \_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

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**EXHIBIT 1**

**SUMMONS**

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND NOT LATER THAN [A date to be determined that is 10 or more days after the completion of publication of the summons in the newspaper]. READ THE INFORMATION BELOW.**

**AVISO! USTED HA SIDO DEMANDADO. EL TRIBUNAL PUEDE DECIDIR CONTRA USTED SIN AUDIENCIA A MENOS QUE USTED RESPONDA NO MÁS TARDE QUE EL DÍA [The date from above that is 10 or more days after the completion of publication of the summons in the newspaper]. LEA LA INFORMACIÓN QUE SIGUE.**

**TO ALL PERSONS INTERESTED IN THE MATTER OF CITY OF SAN JOSE ORDINANCE NO. 30716, ESTABLISHING AN ANNUAL GUN HARM REDUCTION FEE.**

A civil complaint has been filed in California Superior Court for the County of Santa Clara by Howard Jarvis Taxpayers Association and other plaintiffs against defendant City of San Jose for the purpose of determining the validity of the City's Annual Gun Harm Reduction Fee.

Plaintiffs allege that the new fee violates their constitutional rights of free speech and association, places an unconstitutional condition on the right to bear arms, is a special tax which needed 2/3 voter approval, unlawfully delegates governmental taxing power to a private organization, and for these reasons is invalid.

To be heard regarding this matter, you must file with the court a written response

to the complaint by [the date from above that is 10 or more days after the completion of publication of the summons in all newspapers]. If you do not file a timely written response with the court, plaintiffs may apply for entry of default and the relief sought by their complaint. You may obtain a copy of the complaint by contacting plaintiffs' counsel using the address or telephone number shown below. If you respond to defend the legality or validity of the matter, you will not be subject to punitive action such as wage garnishment or seizure of real or personal property.

**YOU MAY SEEK THE ADVICE OF AN ATTORNEY IN ANY MATTER CONNECTED WITH THE COMPLAINT OR THIS SUMMONS. SUCH ATTORNEY SHOULD BE CONSULTED PROMPTLY SO THAT YOUR PLEADING MAY BE FILED OR ENTERED WITHIN THE TIME REQUIRED BY THIS SUMMONS.**

**PUEDE SOLICITAR EL CONSEJO DE UN ABOGADO EN CUALQUIER ASUNTO RELACIONADO CON LA DENUNCIA O CON ESTA CITACIÓN. DICHO ABOGADO DEBERÁ CONSULTARSE INMEDIATAMENTE PARA QUE SU ALEGATO PUEDA SER PRESENTADO O ENTRADO EN EL MOMENTO REQUERIDO POR ESTA CITACIÓN JUDICIAL.**

The name and address of the Court is (El nombre y dirección del Tribunal es):

Superior Court, County of Santa Clara

191 North First Street

San Jose, CA 95113

CASE NUMBER (Numero del Caso): 22CV395596



The name, address, and telephone number of plaintiffs' attorney is (El nombre, dirección y número de teléfono de los abogados del demandante es):

Timothy A. Bittle

Howard Jarvis Taxpayers Foundation

921 11<sup>th</sup> Street, Ste. 1201

Sacramento, CA 95814

Tel: 916-444-9950

1 JONATHAN M. COUPAL, State Bar No. 107815  
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 6 Sacramento, CA 95814  
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 8 Email: tim@hjta.org

9 Attorneys for Plaintiffs

**FILED**  
 MAR 23 2022

Clerk of the Court  
 Superior Court of CA County of Santa Clara  
 BY L. Sandoval DEPUTY

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
 9 **FOR THE COUNTY OF SANTA CLARA**

10 HOWARD JARVIS TAXPAYERS ASSN., ) No. 22CV395596  
 11 SILICON VALLEY TAXPAYERS ASSN., )  
 12 SILICON VALLEY PUBLIC ACCOUNTA- )  
 13 BILITY FOUNDATION, JIM BARRY, and )  
 14 GEORGE ARRINGTON, )

15 Plaintiffs

16 v.

17 CITY OF SAN JOSE, and ALL PERSONS )  
 18 INTERESTED in the matter of San Jose )  
 19 Ordinance No. 30716, establishing an )  
 20 Annual Gun Harm Reduction Fee, )

21 Defendants

**PROOF OF SERVICE**

Department: 20  
 Case Filed: March 7, 2022  
 Trial Date: Not Set

Calendar preference per CCP § 867

**PROOF OF SERVICE**

I, Kiaya Algea, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is: 921 11th Street, Suite 1201, Sacramento, California 95814. On March 17, 2022, I served:

• **EX PARTE APPLICATION FOR ORDER APPROVING PUBLICATION OF SUMMONS; DECLARATION OF TIMOTHY BITTLE; MEMORANDUM OF POINTS AND AUTHORITIES**

- **[PROPOSED] ORDER APPROVING PUBLICATION OF SUMMONS**
- **PROOF OF SERVICE**

on the interested parties below, using the following means:

**SEE ATTACHED SERVICE LIST**

X **BY U.S. MAIL** On the date listed above, I enclosed the documents in a sealed envelope or package addressed to the interested parties at their respective addresses listed below and deposited the sealed envelopes with the United States Postal Service, with the postage fully prepaid. The envelope or package was placed in the mail at Vacaville, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 17, 2022, at Vacaville, California.

  
Kiaya R. Algea

**SERVICE LIST**

Nora Frimann  
Office of the City Attorney  
200 E. Santa Clara Street, 16<sup>th</sup> Floor  
San Jose, CA 95113  
Phone: (408) 535-1900  
*Attorneys for Defendant City of San Jose*

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 Tamarah P. Prevost (SBN 313422)  
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 tprevost@cpmlegal.com  
 mmontenegro@cpmlegal.com

Attorneys for CITY OF SAN JOSE

**FILED**  
 MAR 22 2022

Clerk of the Court  
 Superior Court of CA County of Santa Clara  
 BY R. Sandoval DEPUTY

**SUPERIOR COURT OF CALIFORNIA**  
**IN AND FOR THE COUNTY OF SANTA CLARA**  
**UNLIMITED JURISDICTION**

HOWARD JARVIS TAXPAYERS ASSN.,  
 SILICON VALLEY TAXPAYERS ASSN.,  
 SILICON VALLEY PUBLIC  
 ACCOUNTABILITY FOUNDATION, JIM  
 BARRY, and GEORGE ARRINGTON,

Plaintiff(s),

v.

CITY OF SAN JOSE, and ALL PERSONS  
 INTERESTED in the matter of San Jose  
 Ordinance No. 30716, establishing an Annual  
 Gun Har Reduction Fee,

Defendant(s).

Case Number: 22CV395596

**CITY OF SAN JOSE'S OPPOSITION  
 TO EX PARTE APPLICATION FOR  
 ORDER APPROVING PUBLICATION  
 OF SUMMONS**

Date: TBD

Time: TBD

Dept. 20

Judge: Hon. Socrates P. Manoukian

Trial Date: Not Assigned

**TELEPHONE APPEARANCE**

**CITY OF SAN JOSE'S OPPOSITION TO EX  
 PARTE APPLICATION FOR ORDER  
 APPROVING PUBLICATION OF SUMMONS**

Case Number: 22CV395596

## I. INTRODUCTION

Defendant CITY OF SAN JOSE (“City”) opposes Plaintiffs’ *Ex Parte* Application for an Order Approving Publication of Summons and requests a hearing. The City’s request is made on the basis that Plaintiffs’ application fails to make the necessary affirmative factual showing of a statutory basis of granting relief *ex parte* under California Rule of Court 3.1202(c). Plaintiffs fail to articulate the necessary statutory basis for the court’s invocation of *in rem* jurisdiction, an obligatory precursor to the court ordering service by publication under California Code of Civil Procedure section 860. That is because Ordinance No. 30716, the San Jose Gun Harm Reduction Ordinance (“Ordinance”), is not the appropriate subject of a reverse validation action. Plaintiff’s citations to Government Code sections 50077.5 and 53511 are inapposite as the Ordinance contains no “special tax” as approved by the voters as required by section 50077.5, nor a “bond, warrant, contract, obligation or evidence of indebtedness” as enumerated in section 53511. For these reasons, and for those set out in further detail below, Plaintiff’s *ex parte* application must be denied.

## II. FACTUAL HISTORY

On February 8, 2022, the San Jose City Council adopted a first in the nation law requiring gun owners to purchase liability insurance and to invest funds generated from fees paid by owners into evidence-based initiatives to reduce gun violence and gun harm. (City of San Jose’s Request for Judicial Notice (“RJN”), Ex. 1.)

The Ordinance was based on findings of the impact of firearm injuries on the community. These findings included but were not limited to the following: that firearm injuries have a significant adverse public health and safety impact nationally; in the State of California, and locally, that between 2010-2014 in Santa Clara County, thirty-one percent of emergency department visits and sixteen percent of hospitalizations from firearms injuries were due to unintentional shootings; that access to firearms within the home doubles the risk that family members will become a victim of homicide, and triples the risk of suicide, and more. (RJN, Ex. 1, pp. 5-7, § 10.32.200.)

The Ordinance requires that gun owners who reside in the City or possess a firearm in the City purchase and maintain a renter's or homeowners' gun liability insurance policy. (See *Id.* at p. 7.) The Ordinance contains an Annual Gun Harm Reduction Fee ("Fee"). (*Id.* at p. 8.) The Fee requires that gun owners who reside or possess a firearm in the City pay an annual Fee to a to-be-designated nonprofit each year which will be used by the nonprofit to provide services to residents of the City that own or possess a firearm in the City or to members of their household. (*Id.* at pp. 8-9.) These expenditures may include suicide prevention programs, violence reduction or domestic violence services or programs, mental health services related to gun violence, or firearms safety education and training. (*Id.* at p. 9.) The Fee will be set forth in the schedule of fees and charges established by resolution of the City Council. (*Id.* at p. 8.) Neither the amount of the annual Fee nor the date by which payment will be required has been set. (*Id.*)

The Ordinance additionally grants the City Manager the authority to promulgate all regulations necessary to implement the requirements of the Ordinance, including but not limited to, the eventual designation of the nonprofit organization that will receive the Fee. (*Id.* at p. 11, § 10.32.235.) The Ordinance shall become effective at the expiration of one hundred eighty days after its adoption. (*Id.* at p. 13.) The Ordinance also contains a severability clause. (*Id.*)

### III. LEGAL STANDARD

A validation action is a lawsuit filed and prosecuted for the purpose of securing a judgment determining the validity of a particular government action or act. (See *Blue v. City of Los Angeles* (2006) 137 Cal. App. 4th 1131, 1135, fn. 4.) California Code of Civil Procedure sections 860 through 870.5 govern validation actions. Section 860 states the following:

A public agency may upon the existence of any matter which under any other laws authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem. (Cal. Proc. Code § 860.)

1 Section 863 authorizes “interested parties”, in a so called “reverse validation action”, to determine  
 2 the validity of a particular agency decision or action. (Cal. Proc. Code § 863.) The validation statutes  
 3 require an interested party to bring a reverse validation action within 60-days of the particular agency  
 4 decision or action. (See *Id.*; see also Cal. Proc. Code § 860.) A central theme in the validation procedures  
 5 is the speedy determination of the validity of the public agency’s decision or act in a single dispositive  
 6 final judgment, to promptly settle all questions about the validity of the agency’s decision or act. (See  
 7 *Davis v. Fresno Unified School District* (2020), 57 Cal. App. 5th 911, 928.)

8 However, not all acts or transactions of a public agency are subject to validation. (*Id.*) Section 860  
 9 does not specifically enumerate the actions which are subject to the validation process. Rather, courts  
 10 must examine other statutes, and cases examining those statutes, to determine the scope of agency  
 11 decisions and acts that are subject to validation under the validation statute. (*Id.*) California has over 200  
 12 statutes that provide validation proceedings, most of which are found in the Government Code and the  
 13 Water Code. (See *Kaatz v. City of Seaside* (2006), 143 Cal. App. 4th 13, 19.) As such, an interested party  
 14 in a reverse validation suit is required to articulate the specific statutory provision authorizing the use of  
 15 validation proceedings over the agency decision or action.

#### 16 IV. ARGUMENT

##### 17 A. **PLAINTIFFS’ *EX PARTE* APPLICATION FOR PUBLICATION FAILS TO ESTABLISH 18 THE NECESSARY STATUTORY BASIS FOR THE COURT’S INVOCATION OF *IN REM* JURISDICTION OVER THE ORDINANCE**

19 Validation actions are *in rem* proceedings. (See Cal. Proc. Code § 860). The California Supreme  
 20 Court has held that *in rem* jurisdiction only attaches if: (1) the court “has the authority to determine the  
 21 subject matter of the controversy”; and (2) the court “has jurisdiction over the thing proceeding against  
 22 as a defendant.” (*Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency*  
 23 (2016), 1 Cal. App. 5th 1084, 1100-1101 citing *Kearney v. Kearney* (1887) 72 Cal. 591, 594 (emphasis  
 24 added).) This framework applies to validation actions as well. (See *Id.*) As such, there is subject matter  
 25 jurisdiction to entertain a validation proceeding only if there is a statutory basis for that jurisdiction and  
 26 if the party seeking to invoke the validation procedures subsequently perfects that jurisdiction by



1 providing the proper type of constructive notice. (See *Id.*, citing *San Diegans for Open Government v.*  
 2 *City of San Diego* (2015) 242 Cal. App. 4th 416, 428 [failure to publish summons in accordance with  
 3 statutory procedures deprives the court of jurisdiction, which deprives the court of the power to rule upon  
 4 the matter.] )

5 Constructive notice alone is not enough to confer subject matter jurisdiction. (See *Id.* at 1101.)

6 As the appeals court stated in *Santa Clarita Org. for Planning & Environment*:

7 If [constructive notice alone] were [enough], a party could compel a court to issue  
 8 validation ruling merely by giving constructive notice of its complaint, even if its  
 9 complaint fell outside of any validation statute; such rogue validation actions would  
 10 eviscerate the legislature's careful effort to specifically delimit when these proceedings  
 11 are applicable.

12 (See *Id.*)<sup>1</sup>

13 **B. GOVERNMENT CODE SECTION 50077.5 DOES NOT APPLY**

14 Plaintiff cites to Government Code section 50077.5 in support of their argument that the ordinance  
 15 contains a "special tax" requiring the Plaintiffs to bring their action via the validation statute. (See  
 16 Plaintiffs' *Ex Parte* Application and Memorandum of Points and Authorities (hereinafter "Plaintiffs' *Ex*  
 17 *Parte* MPA"), p. 5, ln. 12-16). Disturbingly, in citing the statute, Plaintiffs omit key language. The  
 18 language of section 50077.5 subsection (a) is reproduced here in full without recourse to misleading  
 19 ellipses. It states the following:

20 Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil  
 21 Procedure applies to any judicial action or proceeding to validate, attack, review,  
 22 set aside, void, or annul an ordinance or resolution approved by the voters

24 <sup>1</sup> That is exactly what Plaintiffs attempt to do here. Plaintiffs' articulation of Government Code sections  
 25 53511 and 50077.5 fails to confer subject matter jurisdiction on this Court as the Ordinance does not  
 26 contain a "special tax" under section 50077.5 nor a "contract" as required under section 53511. As  
 27 such, this Court has no authority to rule on this matter subject to the validation procedures, nor the  
 authority to order service by publication under section 863.

1            pursuant to this article on or after January 1, 1986, that leaves a special tax, or  
 2            modifies or amends an existing ordinance or resolution that levies a special tax.  
 3            (Gov't Code § 50077.5(a)).

4            Section 50077.5 requires further context. This section is a provision in Article 3.5 of Chapter 1,  
 5            Part 1, Division 1, Title 5 of the Government Code. Article 3.5 is comprised of Government Code sections  
 6            50075 through 50077.5, *i.e.*, the provision cited by Plaintiffs. Section 50077 addresses the content of the  
 7            special tax ordinance to be put to voters envisioned by Article 3.5.

8            Section 50077(a) states the following:

9            “[T]he legislative body of any city, county, or district may, following notice and  
 10            public hearing, propose by ordinance or resolution the adoption of a special tax.

11            The ordinance or resolution shall include the type of tax and rate of tax to be levied,  
 12            the method of collection, and the date upon which an election shall be held to  
 13            approve the levy of the tax.”

14            (Cal. Gov. Code § 50077(a); (b); (c) addressing the collection of the special tax and incorporation,  
 15            formation and reorganization issues related to special taxes).

16            It is within this statutory context that section 50077.5 addresses the Validation Statute. For section  
 17            50077.5 to apply, the “special tax” must have been adopted pursuant to Government Code sections 50075  
 18            through 50077.5. Here, as Plaintiffs concede in a parenthetical aside, the Ordinance’s proposed fee was  
 19            not undertaken, adopted, or implemented pursuant to those sections. Accordingly, section 50077.5 cannot  
 20            confer subject matter jurisdiction for validation proceedings over the Ordinance on this court. (See  
 21            *generally* RFJN, Exhibit 1.)

#### 22            C.        GOVERNMENT CODE SECTION 53511 DOES NOT APPLY

23            Section 53511 specifically enumerates the actions subject to validation: “bonds, warrants, contracts,  
 24            obligations or evidences of indebtedness.” (See Gov’t Code § 53511). Plaintiffs claim that the  
 25            Ordinance’s direction that the City Manager designate a private nonprofit organization to collect and  
 26

1 spend the Annual Gun Harm Reduction Fee falls under the terms of section 53511, thus requiring  
2 validation. (See Plaintiffs' *Ex Parte* MPA, p. 5, ln. 17-23).

3 The Ordinance, only recently adopted on February 8, 2022, directs the City Manager to  
4 promulgate regulations to *designate* a nonprofit to perform these tasks. This direction is in plain contrast  
5 to Plaintiffs' baseless belief that a nonprofit has already been designated to perform these tasks.

6 Nevertheless, even were that not the case, the contract itself would not fall under the terms of the  
7 statute. Section 53511's enumerated list is construed narrowly by the courts (*e.g.*, only contracts  
8 involving an agency's financing and financial obligations fall within the statute). (See *Davis v. Fresno*  
9 *Unified School Dist.* (2020) 57 Cal. App. 5th 911.)

10 *Davis* is instructive. *Davis* involved, in part, construction contracts between Fresno Unified and  
11 a contractor to build new school facilities. (*Id.* at 918.) In these contracts, the school district paid for the  
12 construction of buildings as they were completed (as opposed to progress payments, etc.), an alternate  
13 approach which the court held could not be characterized as a method of financing the construction of  
14 new school facilities. (*Id.* at 940-41). The court explained that an "ordinary construction contract" did  
15 not fall under the terms of section 53511 as it did not provide the school district with any financing nor  
16 spread the district's obligation to pay for the new construction over a significant period of time. (*Id.* at  
17 941.) Even though the school district would pay the contractor with proceeds obtained from the sale of  
18 bonds, the Contractor was not a source of financing for the project. (*Id.*) As such, the use of bond funds  
19 did not support the plaintiff's conclusion that the contracts were in the nature or directly related to a  
20 public agency's bonds or other evidences of indebtedness. (*Id.*)

21 Accordingly, for section 53511 to apply to confer subject matter jurisdiction for a validation  
22 action, the statute requires that the contracts be more than just simple service agreements. Rather, they  
23 must be "directly related to a public agency's bonds or other evidences of indebtedness" for the statute  
24 to apply. (See generally, *Id.*)

25 Here, the Ordinance authorizes the City Manager to promulgate regulations necessary to  
26 implement the "designation of the nonprofit organization that will receive the Gun Harm Reduction Fee,

any processes and procedures related to the payment of the fee, and any additional guidelines or auditing the use of the monies from the fee.” (RFJN, Exhibit 1, § 10.32.235(A)(2).) There is no indication in the language of the Ordinance, nor have Plaintiffs advanced any argument thereon, that this designation constitutes a contract directly related to a public agency’s bonds or other evidences of indebtedness. Consequently, section 53511 cannot confer subject matter jurisdiction for validation proceedings over the Ordinance on this court.

### V. CONCLUSION

Plaintiffs fail to make the necessary showing under California Rule of Court 3.1202(c) of an initial statutory basis for invoking the validation procedures entitling them to proceed with service by publication. Consequently, this court has no authority to rule on the Ordinance under the validation procedures, nor the authority to order service by publication. Since the necessary initial statutory basis to confer *in rem* jurisdiction upon this court does not exist Plaintiff’s *ex parte* request for service by publication must be denied.

Respectfully submitted,

COTCHETT, PITRE & McCARTHY, LLP

By: 

Joseph W. Cotchett  
Tamarah P. Prevost  
Melissa Montenegro

Attorneys for CITY OF SAN JOSE

Dated: March 21, 2022

**PROOF OF SERVICE**

CASE NAME: HOWARD JARVIS TAXPAYERS ASSN., et al., v. CITY OF SAN JOSE

CASE NO.: 22CV395596

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905, and is located in the county where the service described below occurred.

On March 21, 2022, I caused to be served the within:

**CITY OF SAN JOSE'S OPPOSITION TO EX PARTE APPLICATION FOR ORDER APPROVING PUBLICATION OF SUMMONS**

☐ by MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

☐ by PERSONAL DELIVERY, with a copy of this declaration, by causing to be personally delivered a true copy thereof to the person at the address set forth below.

☐ by FACSIMILE TRANSMISSION, with a copy of this declaration, to a facsimile machine at the facsimile machine telephone number listed below.

The above-described transmission was reported as complete without error by a transmission report issued by the facsimile machine immediately following the transmission.

☐ by ELECTRONIC SERVICE listed below, transmitted using the One Legal Process Service electronic filing system. The document(s) listed above was/were electronically served to the electronic address(s) below

☒ by ELECTRONIC TRANSMISSION, with a copy of this declaration, to an electronic address listed below.

I further declare that the electronic transmission was sent on March 21, 2022, before 5:30 p.m., and that the City of San Jose, City Attorney's electronic address is [CAO.Main@sanjoseca.gov](mailto:CAO.Main@sanjoseca.gov).

The above-described transmission was reported as sent by a transmission report available for printing from the computer.

☐ by EXPRESS MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

9

CITY OF SAN JOSE'S OPPOSITION TO EX PARTE APPLICATION FOR ORDER APPROVING PUBLICATION OF SUMMONS	Case Number: 22CV395596
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I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

☐ by OVERNIGHT DELIVERY, with a copy of this declaration, by depositing them into a sealed envelope/package, with delivery fees fully prepaid/provided for, and

☐

causing the envelope/package to be deposited for collection

causing the envelope/package to be delivered to an authorized courier or driver to receive the envelope/package

designated by the express service carrier for next day delivery.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for overnight delivery by an express courier service. Such correspondence would be deposited with the express service or delivered to the authorized express service courier/driver to receive an envelope/package for the express service that same day in the ordinary course of business.

Addressed as follows:

Jonathan M. Coupal  
Timothy A. Bittle  
Laura A. Dougherty  
Howard Jarvis Taxpayers Foundation  
921 Eleventh Street, Suite 1201  
Sacramento, CA 95814  
Tel: (916) 444-9950  
Email: [tim@hjta.org](mailto:tim@hjta.org)

***Attorneys for Plaintiffs Howard Jarvis  
Taxpers Assn., Silicon Valley Taxpayers  
Assn., Silicon Valley Public Accountability  
Foundation, Jim Barry, and George  
Arrington***

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 21, 2022, at San Jose, California.

Brian Ward  
Brian Ward

10

CITY OF SAN JOSE'S OPPOSITION TO EX  
PARTE APPLICATION FOR ORDER  
APPROVING PUBLICATION OF SUMMONS

Case Number: 22CV395596

Joseph W. Cotchett (SBN 36324)  
 Tamarah P. Prevost (SBN 313422)  
 Melissa Montenegro (SBN 329099)  
**COTCHETT, PITRE & McCARTHY, LLP**  
 San Francisco Airport Office Center  
 840 Malcolm Road, Suite 200  
 Burlingame, CA 94010  
 Telephone: (650) 697-6000  
 Facsimile: (650) 697-0577  
 jcotchett@cpmlegal.com  
 tprevost@cpmlegal.com  
 mmontenegro@cpmlegal.com

Attorneys for CITY OF SAN JOSE

**FILED**  
 MAR 22 2022  
 Clerk of the Court  
 Superior Court of CA County of Santa Clara  
 BY R. Sandoval DEPUTY

**SUPERIOR COURT OF CALIFORNIA  
 IN AND FOR THE COUNTY OF SANTA CLARA  
 UNLIMITED JURISDICTION**

HOWARD JARVIS TAXPAYERS ASSN.,  
 SILICON VALLEY TAXPAYERS ASSN.,  
 SILICON VALLEY PUBLIC  
 ACCOUNTABILITY FOUNDATION, JIM  
 BARRY, and GEORGE ARRINGTON,

Plaintiff(s),

v.

CITY OF SAN JOSE, and ALL PERSONS  
 INTERESTED in the matter of San Jose  
 Ordinance No. 30716, establishing an Annual  
 Gun Har Reduction Fee,

Defendant(s).

Case Number: 22CV395596

**CITY OF SAN JOSE'S REQUEST FOR  
 JUDICIAL NOTICE IN SUPPORT OF  
 OPPOSITION TO EX PARTE  
 APPLICATION FOR ORDER  
 APPROVING PUBLICATION OF  
 SUMMONS**

Date: TBD

Time: TBD

Dept. 20

Judge: Hon. Socrates P. Manoukian

Trial Date: Not Assigned

**TELEPHONE APPEARANCE**

**CITY OF SAN JOSE'S REQUEST FOR JUDICIAL  
 NOTICE IN SUPPORT OF OPPOSITION TO EX  
 PARTE APPLICATION FOR ORDER  
 APPROVING PUBLICATION OF SUMMONS**

Case Number: 22CV395596

Pursuant to California Evidence Code sections 452, and 453, and California Rules of Court 3.1306(c), Defendant City of San Jose ("City") respectfully requests that the Court take judicial notice of the following documents attached hereto.

1. Ordinance No. 30716, "An Ordinance of the City of San Jose Adding Part 6 to Chapter 10.32 of Title 10 of the San Jose Municipal Code To reduce Gun Harm By Requiring Gun Owners to Obtain and Maintain Liability Insurance and Establishment of Annual Gun Harm Reduction Fee." A true and correct copy of this certified document is attached hereto as Exhibit 1. The Ordinance is the proper subject of judicial notice under Evidence Code section 452(b), which provides that the Court may take judicial notice of legislative enactments issued by any public entity in the United States.

Respectfully submitted,

Dated: March 21, 2022

COTCHETT, PITRE & McCARTHY, LLP

By:

  
Joseph W. Cotchett  
Tamarah P. Prevost  
Melissa Montenegro

Attorneys for CITY OF SAN JOSE

CITY OF SAN JOSE'S REQUEST FOR JUDICIAL  
NOTICE IN SUPPORT OF OPPOSITION TO EX  
PARTE APPLICATION FOR ORDER  
APPROVING PUBLICATION OF SUMMONS

Case Number: 22CV395596





## CITY OF SAN JOSÉ, CALIFORNIA

Office of the City Clerk  
200 East Santa Clara Street  
San José, California 95113  
Telephone (408) 535-1260  
FAX (408) 292-6207

City Clerk

STATE OF CALIFORNIA)  
COUNTY OF SANTA CLARA)  
CITY OF SAN JOSE)

I, Toni J. Taber, City Clerk & Ex-Officio Clerk of the Council of and for the City of San Jose, in said County of Santa Clara, and State of California, do hereby certify that "**Ordinance No. 30716**", the original copy of which is attached hereto, was passed for publication of title on the **25<sup>th</sup> day of January, 2022**, was published in accordance with the provisions of the Charter of the City of San Jose, and was given final reading and adopted on the **8<sup>th</sup> day of February, 2022**, with a bifurcated vote as follows:

**Including Insurance Requirements; Excluding Sections 10.32.215, 10.32.220, and 10.32.230(b)**

AYES: ARENAS, CARRASCO, ESPARZA, COHEN, FOLEY, JONES,  
JIMENEZ, MAHAN, PERALEZ, LICCARDO.

NOES: DAVIS.

ABSENT: NONE.

DISQUALIFIED: NONE.

**Excluding Insurance Requirements; Sections 10.32.215, 10.32.220, and 10.32.230(b) only:**

AYES: ARENAS, CARRASCO, COHEN, ESPARZA, JONES, JIMENEZ, PERALEZ, LICCARDO.

NOES: DAVIS, FOLEY, MAHAN.

ABSENT: NONE.

DISQUALIFIED: NONE.

Said Ordinance is effective as of the **11<sup>th</sup> day of March, 2022**.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the City of San Jose, this **8<sup>th</sup> Day of February, 2022**.

(SEAL)

/rmk

TONI J. TABER, CMC  
CITY CLERK & EX-OFFICIO  
CLERK OF THE CITY COUNCIL

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

**ORDINANCE NO. 30716**

**AN ORDINANCE OF THE CITY OF SAN JOSE ADDING  
PART 6 TO CHAPTER 10.32 OF TITLE 10 OF THE SAN  
JOSE MUNICIPAL CODE TO REDUCE GUN HARM BY  
REQUIRING GUN OWNERS TO OBTAIN AND MAINTAIN  
LIABILITY INSURANCE AND ESTABLISHMENT OF  
ANNUAL GUN HARM REDUCTION FEE**

**WHEREAS**, the Constitution of the United States of America affords certain protections to the ownership of firearms; and

**WHEREAS**, the United States Supreme Court has recognized that the Constitutional protections related to firearms ownership are not unlimited, and can be subject to certain types of governmental regulations; and

**WHEREAS**, a city's police power includes the power to regulate firearms and many courts throughout the nation have upheld local regulations related to the ownership or possession of firearms; and

**WHEREAS**, firearm injuries have a significant adverse public health and safety impact nationally, in the State of California, and locally; and

**WHEREAS**, each year more than 23,000 United States residents die by firearm suicide, 14,000 die by firearm homicide, and nearly 500 die from unintentional firearm injuries; and

**WHEREAS**, in California, between 2005 and 2015, nearly 4,000 children and teenagers were killed or injured with firearms, and 533 children and teenagers committed suicide with firearms, according to data from the Center for Disease Control and Prevention; and

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

**WHEREAS**, the Santa Clara County Public Health Department issued a report on firearm injuries in April 2018. In 2016, 11% of injury deaths were due to firearms injuries. During the period 2007-2016, there were an average of 46 deaths per year due to self-inflicted/suicide from firearms injuries, and an average of 28 deaths per year due to assault/homicide from firearms injuries. Self-inflicted/suicide accounted for the highest percentage of deaths (59%) from firearms injuries, with assault/homicide accounting for 36% of deaths from firearm injuries; and

**WHEREAS**, the April 2018 Santa Clara County Public Health Department report on firearm injuries reported that during the period from 2010-2014, there were an annual average of 28 emergency department visits and 12 hospitalizations due to unintentional firearms injuries. During 2010-2014, 31% of emergency department visits and 16% of hospitalizations from firearms injuries were due to unintentional shootings; and

**WHEREAS**, research published in the American Journal of Epidemiology in 2004 found that regardless of storage practice, type of gun, or number of firearms in the home, having a gun in the home was associated with an increased risk of firearm homicide and firearm suicide in the home; and

**WHEREAS**, a 2014 review in the Annals of Internal Medicine suggests that access to firearms within the home doubles the risk that family members will become a victim of homicide, and triples the risk of suicide; and

**WHEREAS**, a study in the New England Journal of Medicine in 2020 found that handgun ownership is associated with eight times greater likelihood for firearm suicide among men, and 35 times greater likelihood of firearm suicide among women; and

**WHEREAS**, according to the American Academy of Pediatrics, in homes with guns, suicide rates in children and adolescents and the likelihood of accidental death by shooting are each four times higher than in homes without guns; and

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

**WHEREAS**, in the past decade, 40% of the suicides committed by children and teens involved guns, and 90% of these suicides were with guns that the victims accessed at their own homes or from a relative's home; and

**WHEREAS**, 58% of shooting deaths in children and teens are homicides, and the risk of homicide is three times higher when there are guns in the home; and

**WHEREAS**, a June 2014 report published by Everytown for Gun Safety and Moms Demand Action which analyzed publicly reported gun deaths nation-wide over a one-year period from December 15, 2012 to December 12, 2013, showed that at least 100 children were killed in unintentional shootings, amounting to nearly two each week; and

**WHEREAS**, according to research published in Social Science and Medicine in 2007 based on data over a three-year study period from 2001 to 2003, states with higher rates of household firearm ownership had higher rates of firearm homicide but not of non-firearm homicide, and this relationship held across gender, age, income and multiple other variables; and

**WHEREAS**, a study in the Journal of Urban Health conducted in 2015 estimated there are as many as 4.6 million children in the United States living in homes with loaded unsecured guns; and

**WHEREAS**, injuries from unintentional shootings, which are generally insurable, comprise more than a third of all gun-related injuries nationally; and

**WHEREAS**, in some instances, gun owners have been successfully sued for harm resulting from the use of the owner's firearm by themselves or a third party; and

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

**WHEREAS**, auto insurers have used risk-adjusted premiums to reward good driving and incentivize use of airbags and other safety features, and by using a comprehensive public health approach to car safety the United States reduced per-mile auto fatalities by nearly 80% from 1967 to 2017; and

**WHEREAS**, similarly, insurance-based mechanisms can encourage firearm owners to take safety classes, use gun safes, install trigger locks, or utilize chamber-load indicators, and according to 2018 research published in The Actuary there is evidence that some actuaries and insurance companies are recognizing firearm-related risk through their product offerings, pricing and underwriting decisions; and

**WHEREAS**, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure & Policy Making resulting in no changes to the physical environment); and

**WHEREAS**, the City Council of the City of San José is the decision-making body for this Ordinance; and

**WHEREAS**, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

**NOW, THEREFORE**, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

**SECTION 1.** Chapter 10.32 of Title 10 of the San José Municipal Code is hereby amended by adding a Part to be numbered, entitled and to read as follows:

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

## Part 6

### REDUCTION OF GUN HARM – LIABILITY INSURANCE REQUIREMENT AND GUN HARM REDUCTION FEE

#### 10.32.200 Purpose and Findings

- A. This Part is passed and adopted in the exercise of the police power of the City, and for the protection of the welfare, peace and comfort of the residents of the City of San José. Specifically, it is the intent of this Ordinance to reduce gun harm.
- B. Findings:
1. Firearm injuries have a significant adverse public health and safety impact nationally, in the State of California, and locally; and
  2. Each year more than twenty-three thousand (23,000) United States residents die by firearm suicide, fourteen thousand (14,000) die by firearm homicide, and nearly five hundred (500) die from unintentional firearm injuries; and
  3. In California, between 2005 and 2015, nearly four thousand (4,000) children and teenagers were killed or injured with firearms, and five hundred thirty-three (533) children and teenagers committed suicide with firearms, according to data from the Center for Disease Control and Prevention; and
  4. During 2010-2014 in Santa Clara County, thirty-one percent (31%) of emergency department visits and sixteen percent (16%) of

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

hospitalizations from firearms injuries were due to unintentional shootings; and

5. A 2014 review in the Annals of Internal Medicine suggests that access to firearms within the home doubles the risk that family members will become a victim of homicide, and triples the risk of suicide; and
6. A study in the New England Journal of Medicine in 2020 found that handgun ownership is associated with eight (8) times greater likelihood for firearm suicide among men, and thirty-five (35) times greater likelihood of firearm suicide among women; and
7. Based upon a November 2021 analysis by Dr. Ted Miller, Ph.D. and the Pacific for Institute Research and Evaluation (PIRE), on average, 206 people suffer death or serious injury from gunshots each year in the City of San José; and
8. Conservatively, San José taxpayers annually spend approximately \$39.7 million, or approximately \$151 per firearm-owning household, to respond to gun violence with such public services as emergency police and medical response, victim assistance, incident investigation, acute and long-term health care, and perpetrator adjudication and judicial sanctioning; and
9. Including private costs to individuals and families in the calculation, San José residents incur an annual financial burden of \$442 million per year for gun deaths and injuries; and
10. Injuries from unintentional shootings, which are generally insurable, comprise more than a third of all gun-related injuries nationally; and

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

11. Auto insurers have used risk-adjusted premiums to reward good driving and incentivize use of airbags and other safety features, and by using a comprehensive public health approach to car safety the United States reduced per-mile auto fatalities by nearly eighty percent (80%) from 1967 to 2017; and
12. Liability insurance can reduce the number of gun incidents by encouraging safer behavior and it can also provide coverage for losses and damages related to gun incidents; and
13. Programs and services to gun owners and their households can also encourage safer behavior, and provide education and resources to those residents.

#### **10.32.205 Definitions**

As used in this Part, the following terms have the following meaning:

- A. "Firearm" means a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion. Firearm does not include antique firearms as defined by 18 U.S.C. Section 921(a).
- B. "Designated Nonprofit Organization" means an entity that qualifies as a nonprofit corporation under the federal internal revenue code and is designated pursuant to the City Manager's authority under Section 10.32.235. No City official or employee shall sit on the board of directors of the Designated Nonprofit Organization.

#### **10.32.210 Liability Insurance Required**



NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

- A. Insurance required. A person who resides in the City and owns or possesses a Firearm in the City shall obtain and continuously maintain in full force and effect a homeowner's, renter's or gun liability insurance policy from an admitted insurer or insurer as defined by the California Insurance Code, specifically covering losses or damages resulting from any accidental use of the Firearm, including but not limited to death, injury or property damage.
- B. For purposes of this Section, a person shall be deemed to be the owner of a Firearm if such Firearm is lost or stolen until such loss or theft is reported to the police department or sheriff which has jurisdiction in which such Firearm owner resides.
- C. Any person who owns a Firearm on the effective date of this Section shall obtain the insurance required by this Section within thirty (30) days of the effective date of this Ordinance, or by a later date certain established in the regulations promulgated by City Manager pursuant to Section 10.32.235.

**10.32.215 Annual Gun Harm Reduction Fee**

A person who resides in the City and owns or possesses a Firearm in the City shall pay an Annual Gun Harm Reduction Fee to the Designated Nonprofit Organization each year. The date by which payment shall be made annually shall be established in the regulations promulgated by City Manager pursuant to Section 10.32.235. The annual fee will be set forth in the schedule of fees and charges established by resolution of the City Council.

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

**10.32.220 Expenditure of Gun Harm Reduction Fee**

- A. All monies from the Gun Harm Reduction Fee shall be expended by the Designated Nonprofit Organization on providing services to residents of the City that own or possess a Firearm in the City, to members of their household, or to those with whom they have a close familial or intimate relationship. Such expenditures may include, but are not necessarily limited to the following:
1. Suicide prevention services or programs;
  2. Violence reduction or gender based violence services or programs;
  3. Addiction intervention and substance abuse treatment;
  4. Mental health services related to gun violence; or
  5. Firearms safety education or training.
- B. No portion of the monies from the Gun Harm Reduction Fee shall be used for litigation, political advocacy, or lobbying activities.
- C. The Designated Nonprofit Organization shall spend every dollar generated from the Gun Harm Reduction Fee, minus administrative expenses, exclusively for programs and initiatives designed to (a) reduce the risk or likelihood of harm from the use of firearms in the City of San José, and (b) mitigate the risk of physical harm or financial, civil, or criminal liability that a San José firearm owner or her family will incur through her possession of firearms. Otherwise, the City shall not specifically direct how the monies from the Gun Harm Reduction Fee are expended.

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

- D. The designated non-profit shall provide a biannual report to an appropriate council committee and the report may also be provided to the City Council, as directed by the council committee.

#### **10.32.225 Exceptions**

The provisions of this Part shall not apply to any of the following:

- A. Those persons designated as peace officers pursuant to Chapter 4.5 of Title 3 of Part 2 of the California Penal Code (§830 et seq.), including sworn peace officers, active reserve peace officers and retired peace officers.
- B. Those persons who have a license to carry a concealed weapon issued pursuant to California Penal Code § 26150 or § 26155, for as long as these statutes are legally enforceable.
- C. Those persons for which compliance with this Part would create a financial hardship.

#### **10.32.230 Compliance**

- A. Insurance requirement. Each person required to obtain and maintain insurance under Section 10.32.210 shall demonstrate compliance with the insurance requirement by completing and executing a City-designated attestation form. Each such person shall state both the name of the insurance company issuing the policy and the number of the insurance policy on the attestation form, sign the form under penalty of perjury and keep the attestation form with the Firearms where they are being stored or transported. Each person shall complete and sign a new attestation form under penalty of perjury in the event any of the information on the form changes. Each person shall present the form when

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

lawfully requested to do so by a peace officer who knows or has reason to believe that a person possesses a firearm.

- B. Fee provisions. Each person shall affix proof of payment of the annual Gun Harm Reduction Fee to the attestation form and keep it with the Firearm or Firearms where they are being stored or transported.

**10.32.235 Authority of the City Manager**

- A. The City Manager is authorized to promulgate all regulations necessary to implement the requirements and fulfill the policies of this Part relating to the reduction of gun harm, including, but not limited, to the following subjects:
1. Processes and procedures related to the implementation of the liability insurance requirement, and forms necessary thereto.
  2. Designation of the nonprofit organization that will receive the Gun Harm Reduction Fee, any processes and procedures related to the payment of the fee, and any additional guidelines or auditing of the use of the monies from the fee.
  3. Designation of any third-party agency and/or organization that will aid in the implementation of the noticing of the requirements of this Part or any other administrative tasks related to the requirements of this Part.
  4. The criteria by which a person can claim a financial hardship exemption from this Part pursuant to Section 10.32.225.C.
- B. Regulations shall be published on the City's website.

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

- C. Regulations promulgated by the City Manager shall have the same force and effect of law. Unless a later date is specified in a regulation, a regulation shall become effective upon date of publication.

#### **10.32.240 Enforcement**

- A. Any violation of this Part shall be punishable by an administrative citation in accordance with the procedures set forth in Chapter 1.15 of Title 1 of this Code relating to the issuance of administrative citations, imposing of administrative fines, right to appeal, and the right to an administrative hearing.
- B. The amounts of the fines for violations imposed pursuant to this Part shall be set forth in the schedule of fines established by resolution of the City Council.
- C. A violation of this Part is also enforceable through all other civil and administrative remedies available to the City.

#### **10.32.245 Impoundment**

To the extent allowed by law, the Firearm or Firearms of a person that is not in compliance with this Part may be impounded subject to a due process hearing.

#### **10.32.250 Fees and Charges**

The City Manager is hereby authorized to charge and collect any and all cost recovery fees associated with fulfilling the policies of this Part relating to the reduction of gun harm, including any associated third-party costs. All fees shall be as set forth in the schedule of fees and charges established by resolution of the City Council.

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

**SECTION 2.** This Ordinance shall become effective at the expiration of one hundred eighty (180) days after its adoption.

**SECTION 3.** Consistent with Section 1.04.160 of the San José Municipal Code, should any provision of this Ordinance or its application to any person or circumstance be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions hereof are severable.

**SECTION 4.** The City Council of the City of San José takes action on this Ordinance based upon the totality of the administrative record including the facts stated above, the facts stated in the memorandums to the City Council for the January 25, 2022 City Council Meeting, as well as any oral or written testimony at the January 25, 2022 City Council meeting.

NVF:TLC:KML  
2/3/2022

ORD. NO. 30716

**PASSED FOR PUBLICATION of title this 25<sup>th</sup> day of January, 2022, by the following bifurcated vote:**

**Including Insurance Requirements; Excluding Sections 10.32.215, 10.32.220, and 10.32.230(b)**

AYES: ARENAS, CARRASCO, COHEN, ESPARZA, FOLEY,  
JONES, JIMENEZ, MAHAN, PERALEZ, LICCARDO.

NOES: DAVIS.

ABSENT: NONE.

DISQUALIFIED: NONE.

**PASSED FOR PUBLICATION of title this 25<sup>th</sup> day of January, 2022, by the following bifurcated vote:**

**Excluding Insurance Requirements; Sections 10.32.215, 10.32.220, and 10.32.230(b) only:**

AYES: ARENAS, CARRASCO, COHEN, ESPARZA, JONES,  
JIMENEZ, PERALEZ, LICCARDO.

NOES: DAVIS, FOLEY, MAHAN.

ABSENT: NONE.

DISQUALIFIED: NONE.



---

SAM LICCARDO  
Mayor

ATTEST:



---

TONI J. TABER, CMC  
City Clerk

**PROOF OF SERVICE**

CASE NAME: HOWARD JARVIS TAXPAYERS ASSN., et al.,v. CITY OF SAN JOSE

CASE NO.: 22CV395596

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905, and is located in the county where the service described below occurred.

On March 21, 2022, I caused to be served the within:

**CITY OF SAN JOSE'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF  
OPPOSITION TO EX PARTE APPLICATION FOR ORDER APPROVING  
PUBLICATION OF SUMMONS**

☐ by MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

☐ by PERSONAL DELIVERY, with a copy of this declaration, by causing to be personally delivered a true copy thereof to the person at the address set forth below.

☐ by FACSIMILE TRANSMISSION, with a copy of this declaration, to a facsimile machine at the facsimile machine telephone number listed below.

The above-described transmission was reported as complete without error by a transmission report issued by the facsimile machine immediately following the transmission.

☐ by ELECTRONIC SERVICE listed below, transmitted using the One Legal Process Service electronic filing system. The document(s) listed above was/were electronically served to the electronic address(s) below

☒ by ELECTRONIC TRANSMISSION, with a copy of this declaration, to an electronic address listed below.

I further declare that the electronic transmission was sent on March 21, 2022, before 5:30 p.m., and that the City of San Jose, City Attorney's electronic address is [CAO.Main@sanjoseca.gov](mailto:CAO.Main@sanjoseca.gov).

The above-described transmission was reported as sent by a transmission report available for printing from the computer.

3

CITY OF SAN JOSE'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO EX PARTE APPLICATION FOR ORDER APPROVING PUBLICATION OF SUMMONS	Case Number: 22CV395596



☐ by EXPRESS MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

☐ by OVERNIGHT DELIVERY, with a copy of this declaration, by depositing them into a sealed envelope/package, with delivery fees fully prepaid/provided for, and

☐ causing the envelope/package to be deposited for collection  
☐ causing the envelope/package to be delivered to an authorized courier or driver to receive the envelope/package

designated by the express service carrier for next day delivery.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for overnight delivery by an express courier service. Such correspondence would be deposited with the express service or delivered to the authorized express service courier/driver to receive an envelope/package for the express service that same day in the ordinary course of business.

Addressed as follows:

Jonathan M. Coupal  
 Timothy A. Bittle  
 Laura A. Dougherty  
 Howard Jarvis Taxpayers Foundation  
 921 Eleventh Street, Suite 1201  
 Sacramento, CA 95814  
 Tel: (916) 444-9950  
 Email: [tim@hjta.org](mailto:tim@hjta.org)

*Attorneys for Plaintiffs Howard Jarvis  
 Taxpers Assn., Silicon Valley Taxpayers  
 Assn., Silicon Valley Public Accountability  
 Foundation, Jim Barry, and George  
 Arrington*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 21, 2022, at San Jose, California.

Brian Ward  
 Brian Ward

4

CITY OF SAN JOSE'S REQUEST FOR JUDICIAL  
 NOTICE IN SUPPORT OF OPPOSITION TO EX  
 PARTE APPLICATION FOR ORDER  
 APPROVING PUBLICATION OF SUMMONS

Case Number: 22CV395596

MAR 23 2022

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 10 Attorneys for Plaintiffs

Filed  
 March 25, 2022  
 Clerk of the Court  
 Superior Court of CA  
 County of Santa Clara  
 22CV395596  
 By: rsandoval

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
 9 **FOR THE COUNTY OF SANTA CLARA**

10 HOWARD JARVIS TAXPAYERS ASSN., ) No. 22CV395596  
 11 SILICON VALLEY TAXPAYERS ASSN., )  
 12 SILICON VALLEY PUBLIC ACCOUNTA- )  
 BILITY FOUNDATION, JIM BARRY, and )  
 GEORGE ARRINGTON, )

13 Plaintiffs )

14 v. )

15 CITY OF SAN JOSE, and ALL PERSONS )  
 16 INTERESTED in the matter of San Jose )  
 Ordinance No. 30716, establishing an )  
 17 Annual Gun Harm Reduction Fee, )

18 Defendants )

**PROPOSED ORDER APPROVING  
 PUBLICATION OF SUMMONS**

Department: 20  
 Case Filed: March 7, 2022  
 Trial Date: Not Set

Calendar preference per CCP § 867

**ORDER**

On the application of plaintiffs, which was considered 24 March, 2022, in Department 20 with notice to counsel for defendant City of San Jose, the Court having considered the authorities cited and good cause appearing therefor:

IT IS HEREBY ORDERED that plaintiffs' application for approval to publish summons as to All Persons Interested in the matter of San Jose Ordinance No. 30716 is GRANTED AS FOLLOWS:

1. Plaintiffs shall use the form of Summons attached hereto as Exhibit 1.
2. Plaintiffs shall cause the Summons to be published once a week for three consecutive weeks, with at least five days intervening between publication dates, in the Legal Notices section of the San Jose Mercury News.
3. Plaintiffs shall obtain Proof of Publication from said newspaper and file it with this Court immediately thereafter, or show good cause for their failure to do so.

DATED: 24 March, 2022.

Signed: 3/24/2022 12:38 PM



HON. Socrates Peter Manoukian  
JUDGE OF THE SUPERIOR COURT

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**EXHIBIT 1**

**SUMMONS**

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND NOT LATER THAN [A date to be determined that is 10 or more days after the completion of publication of the summons in the newspaper]. READ THE INFORMATION BELOW.**

**AVISO! USTED HA SIDO DEMANDADO. EL TRIBUNAL PUEDE DECIDIR CONTRA USTED SIN AUDIENCIA A MENOS QUE USTED RESPONDA NO MÁS TARDE QUE EL DÍA [The date from above that is 10 or more days after the completion of publication of the summons in the newspaper]. LEA LA INFORMACIÓN QUE SIGUE.**

**TO ALL PERSONS INTERESTED IN THE MATTER OF CITY OF SAN JOSE ORDINANCE NO. 30716, ESTABLISHING AN ANNUAL GUN HARM REDUCTION FEE.**

A civil complaint has been filed in California Superior Court for the County of Santa Clara by Howard Jarvis Taxpayers Association and other plaintiffs against defendant City of San Jose for the purpose of determining the validity of the City's Annual Gun Harm Reduction Fee.

Plaintiffs allege that the new fee violates their constitutional rights of free speech and association, places an unconstitutional condition on the right to bear arms, is a special tax which needed 2/3 voter approval, unlawfully delegates governmental taxing power to a private organization, and for these reasons is invalid.

To be heard regarding this matter, you must file with the court a written response

1 to the complaint by [the date from above that is 10 or more days after the completion of  
2 publication of the summons in all newspapers]. If you do not file a timely written response  
3 with the court, plaintiffs may apply for entry of default and the relief sought by their  
4 complaint. You may obtain a copy of the complaint by contacting plaintiffs' counsel using  
5 the address or telephone number shown below. If you respond to defend the legality or  
6 validity of the matter, you will not be subject to punitive action such as wage garnishment  
7 or seizure of real or personal property.

8  
9 **YOU MAY SEEK THE ADVICE OF AN ATTORNEY IN ANY MATTER**  
10 **CONNECTED WITH THE COMPLAINT OR THIS SUMMONS. SUCH ATTORNEY**  
11 **SHOULD BE CONSULTED PROMPTLY SO THAT YOUR PLEADING MAY BE FILED**  
12 **OR ENTERED WITHIN THE TIME REQUIRED BY THIS SUMMONS.**

13  
14 **PUEDE SOLICITAR EL CONSEJO DE UN ABOGADO EN CUALQUIER ASUNTO**  
15 **RELACIONADO CON LA DENUNCIA O CON ESTA CITACIÓN. DICHO ABOGADO**  
16 **DEBERÁ CONSULTARSE INMEDIATAMENTE PARA QUE SU ALEGATO PUEDA SER**  
17 **PRESENTADO O ENTRADO EN EL MOMENTO REQUERIDO POR ESTA CITACIÓN**  
18 **JUDICIAL.**

19  
20 The name and address of the Court is (El nombre y dirección del Tribunal es):

21  
22 Superior Court, County of Santa Clara

23 191 North First Street

24 San Jose, CA 95113

25 CASE NUMBER (Numero del Caso): 22CV395596  
26  
27

1 The name, address, and telephone number of plaintiffs' attorney is (El nombre, dirección  
2 y número de teléfono de los abogados del demandante es):

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**PROOF OF SERVICE**

I am employed in San Mateo County, California, and I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Cotchett, Pitre & McCarthy, LLP, 840 Malcolm Road, Burlingame, California, 94010. On this day, I served the following document(s) in the manner described below:

**DEFENDANT CITY OF SAN JOSE'S NOTICE OF THE FILING OF A NOTICE OF REMOVAL OF ACTION TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

✓ **BY MAIL:** I am readily familiar with this firm's practice for collection and processing of correspondence for mailing. Following that practice, I placed a true copy of the aforementioned document(s) in a sealed envelope, addressed to each addressee, respectively, as specified below. The envelope was placed in the mail at my business address, with postage thereon fully prepaid, for deposit with the United States Postal Service on that same day in the ordinary course of business.

✓ **BY E-MAIL:** My e-mail address is kdelia@cpmlegal.com and service of this document(s) occurred on the date shown below. This document is being served electronically and the transmission was reported as complete and without error.

Jonathan M. Coupal Timothy A. Bittle Laura E. Dougherty Howard Jarvis Taxpayers Foundation 921 Eleventh Street, Suite 1201 Sacramento, CA 95814 Telephone: (916) 444-9950 Email: tim@hjta.org	Attorneys for Plaintiffs Howard Jarvis Taxpayers Association; Silicon Valley Taxpayers Association, Inc.; Silicon Valley Public Accountability Foundation; James Barry; and George Arrington
--	--

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Burlingame, California, on April 15, 2022.

/s/ Kathleen D'Elia

Kathleen D'Elia



Case 5:22-cv-00501-BLF Document 36 Filed 04/08/22 Page 1 of 34

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

**NATIONAL ASSOCIATION FOR GUN  
RIGHTS, INC.**, a non-profit corporation, and  
**MARK SIKES**, an individual,

Plaintiffs,

**v.**

**CITY OF SAN JOSE**, a public entity;  
**JENNIFER MAGUIRE**, in her official capacity  
as City Manager of the City of San Jose; and  
**CITY OF SAN JOSE CITY COUNCIL**,

Defendants.

**Case No. 5:22-cv-00501-BLF**

**DEFENDANTS' MOTION TO DISMISS  
PLAINTIFFS' FIRST AMENDED  
COMPLAINT**

Date: August 4, 2022  
Time: 9:00 A.M.  
Courtroom: Via Zoom Webinar  
Judge: Hon. Beth Labson Freeman

Complaint filed: January 25, 2022  
FAC filed: February 14, 2022

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on August 4, 2022, at 9:00 A.M., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Beth Labson Freeman, United States District Judge for the Northern District of California, located at 280 South 1st Street, San Jose, California, 95113, Defendants City of San Jose, Jennifer Maguire in her official capacity as City Manager of the City of San Jose, and the City of San Jose City Council will and hereby do move this Court to dismiss the First Amended Complaint (ECF No. 19) ("FAC") filed by Plaintiffs National Association for Gun Rights, Inc., and Mark Sikes in its entirety under Federal Rule of Civil Procedure ("Rule") 12(b)(1) and under Rule 12(b)(6) for failure to state a claim as to each of Plaintiffs' six causes of action.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the supporting Declaration of Tamarah P. Prevost and Sarah Zarate and all corresponding exhibits attached thereto, the Proposed Order, the anticipated reply brief, and any other papers Defendants may file in support of the motion, as well as all judicially noticeable facts, the files and records in this action, and such other evidence and argument as may be provided to the Court at or before the hearing.

Dated: April 8, 2022

**COTCHETT, PITRE & McCARTHY, LLP**By: /s/ Tamarah P. Prevost

JOSEPH W. COTCHETT  
TAMARAH P. PREVOST  
ANDREW F. KIRTLEY  
MELISSA MONTENEGRO

*Attorneys for Defendants*

**TABLE OF CONTENTS**

	<b>Page</b>
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. FACTUAL AND PROCEDURAL BACKGROUND .....</b>	<b>2</b>
A. History of the Ordinance and Procedural Posture .....	2
B. Summary of the Ordinance .....	3
1. Liability Insurance Requirement .....	4
2. Annual Gun Harm Reduction Fee .....	4
3. Self-Certification of Compliance .....	5
<b>III. LEGAL STANDARDS.....</b>	<b>6</b>
A. Rule 12(b)(1).....	6
B. Rule 12(b)(6).....	6
<b>IV. ARGUMENT .....</b>	<b>7</b>
A. THE COURT SHOULD DISMISS THE FAC UNDER RULE 12(b)(1). .....	7
1. The FAC Fails for Lack of Ripeness.....	7
2. The FAC Does Not State a Proper Facial Constitutional Challenge.....	9
B. THE COURT SHOULD DISMISS THE FAC UNDER RULE 12(b)(6). .....	10
1. Plaintiffs Fail to State a Second Amendment Claim.....	10
a. <i>The Appropriate Level of Scrutiny is Intermediate Scrutiny.</i> .....	10
b. <i>The Ordinance Easily Survives Intermediate Scrutiny.</i> .....	12
2. Plaintiffs Fail to State a First Amendment Claim Based on Compelled Speech or Association.....	16
3. Plaintiffs Fail to Sufficiently Allege State Law Preemption.....	17
4. Plaintiffs Fail to State a Claim that the Ordinance Imposes a Tax in Violation of the California Constitution.....	19
5. The Ordinance Does Not Violate the San Jose City Charter. ....	20
a. <i>The Charter Does Not Require Placing the Fee into the General Fund.</i> .....	21
b. <i>The Fee is Not Subject to the Charter's Budgetary Procedures.</i> .....	21
c. <i>The Council Properly Delegated Regulatory Authority to the City Manager.</i> .....	22
6. Plaintiffs Fail to State a Claim for Declaratory Relief. ....	23
C. THE FAC SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND.....	23
<b>V. CONCLUSION.....</b>	<b>24</b>

**TABLE OF AUTHORITIES****Page(s)****Cases**

<i>1300 N. Curson Investors, LLC v. Drumea</i> , 225 Cal.App.4th 325 (2014) .....	21
<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967).....	7
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	7
<i>Bauer v. Becerra</i> , 858 F.3d 1216 (9th Cir. 2017) .....	12, 15, 16
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	7
<i>Birkenfeld v. City of Berkeley</i> , 17 Cal.3d 129 (Cal. 1976).....	22
<i>Bishop v. City of San Jose</i> , 1 Cal.3d 56 (1969) .....	18
<i>Cal. Democratic Party v. Jones</i> , 530 U.S. 567 (2000) (Stevens, J., dissenting).....	17
<i>Cal. Rifle &amp; Pistol Assn. v. City of West Hollywood</i> , 66 Cal.App.4th 1302 (1998) .....	19
<i>Calguns Foundation, Inc. v. County of San Mateo</i> , 218 Cal.App.4th 661 (2013) .....	19
<i>Chandler v. State Farm Mut. Auto. Ins. Co.</i> , 598 F.3d 1115 (9th Cir. 2010) .....	8
<i>City of Renton v. Playtime Theaters, Inc.</i> , 475 U.S. 41 (1986).....	14
<i>City of San Jose v. Lynch</i> , 4 Cal.2d 760 (1935) .....	21
<i>Cox v. New Hampshire</i> , 312 U.S. 569 (1941).....	15
<i>Cramer v. Brown</i> , 2012 WL 13059699 (C.D. Cal. Sept. 12, 2012) .....	7

**DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; CASE NO. 5:22-CV-00501-BLF**

ii

1	<i>District of Columbia v. Heller,</i>	
2	554 U.S. 570 (2008).....	10, 11, 15
3	<i>Galvan v. Superior Court,</i>	
4	70 Cal.2d 851 (1969) .....	19
5	<i>Gonzales v. Carhart,</i>	
6	550 U.S. 124 (2007).....	9
7	<i>Great Western Shows, Inc. v. County of Los Angeles,</i>	
8	27 Cal.4th 853 (Cal. 2002).....	18, 19
9	<i>Heller v. District of Columbia,</i>	
10	670 F.3d 1244 (D.C. Cir. 2011).....	11
11	<i>Heller v. District of Columbia,</i>	
12	801 F.3d 264 (D.C. Cir. 2015).....	12
13	<i>Isaakhani v. Shadow Glen Homeowners Assn., Inc.,</i>	
14	63 Cal.App.5th 917, 931-932 (2021) .....	21
15	<i>Jackson v. City and County of San Francisco,</i>	
16	746 F.3d 953 (9th Cir. 2014) .....	<i>passim</i>
17	<i>Janus v. AFSCME, Council 31,</i>	
18	138 S. Ct. 2448 (2018).....	16
19	<i>Kachalsky v. County of Westchester,</i>	
20	701 F.3d 81 (2d Cir. 2012).....	13
21	<i>Keller v. State Bar of California,</i>	
22	496 U.S. 1 (1990).....	16, 17
23	<i>Kokkonen v. Guardian Life Ins. Co. of Am.,</i>	
24	511 U.S. 375 (1994).....	6
25	<i>Kwong v. Bloomberg,</i>	
26	723 F.3d 160 (2d Cir. 2013), <i>cert. denied</i> , 134 S. Ct. 2696 (2014).....	12, 15
27	<i>Lares v. West Bank One,</i>	
28	188 F.3d 1166 (9th Cir. 1999) .....	21
	<i>Laurent v. City and County of San Francisco,</i>	
	99 Cal.App.2d 707 (1950) .....	21
	<i>Leadsinger Inc. v. BMG Music Pub.</i>	
	512 F.3d at 532 (9th Cir. 2008).....	23

1	<i>Lopez v. Turnage</i> ,	
2	2021 WL 5142070 (N.D. Cal. Oct. 15, 2021).....	23
3	<i>Los Angeles Unified Sch. Dist. v. Garcia</i> ,	
4	58 Cal.4th 175 (2013) .....	21
5	<i>McDonald v. City of Chicago</i> ,	
6	561 U.S. 742 (2010).....	15
7	<i>Minneapolis Star and Tribune Co. v. Minnesota Comm’r of Rev.</i> ,	
8	460 U.S. 575 (1983).....	15
9	<i>Morongo Band of Mission Indians v. Cal. State Bd. of Equalization</i> ,	
10	858 F.2d 1376 (9th Cir. 1988), <i>cert. denied</i> , 488 U.S. 1006 (1989).....	23
11	<i>Murdock v. Pennsylvania</i> ,	
12	319 U.S. 105 (1943).....	15, 16
13	<i>Nat’l Park Hosp. Assn. v. Dep’t. of Interior</i> ,	
14	538 U.S. 803 (2003).....	8
15	<i>Nordyke v. King</i> ,	
16	681 F.3d 1041 (9th Cir. 2012) (en banc), <i>cert. denied</i> , 133 S. Ct. 840 (2013).....	10, 15
17	<i>O’Connell v. Gross</i> ,	
18	No. CV 19-11654-FDS, 2020 WL 1821832 (D. Mass. Apr. 10, 2020).....	12
19	<i>Olsen v McGillicuddy</i> ,	
20	15 Cal. App. 3d 897 (1971) .....	19
21	<i>Parks Sch. of Bus. v. Symington</i> ,	
22	51 F.3d 1480 (9th Cir. 1995) .....	6
23	<i>Portland Police Ass’n v. City of Portland</i> ,	
24	658 F.2d 1272 (9th Cir. 1981) .....	23
25	<i>Reno v. Catholic Soc. Servs., Inc.</i> ,	
26	509 U.S. 43 (1993).....	6
27	<i>Rizzo v. Goode</i> ,	
28	423 U.S. 362 (1976).....	23
	<i>S. Cal. Edison Co. v. Pub. Util. Comm’n</i> ,	
	227 Cal.App.4th 172 (2014) .....	20
	<i>Sacramento Chamber of Commerce v. Stephens</i> ,	
	212 Cal. 607 (1931) .....	22
	<i>Safe Air for Everyone v. Meyer</i> ,	
	373 F.3d 1035 (9th Cir. 2004) .....	6

1	<i>Schmeer v. County of Los Angeles,</i>	
2	213 Cal.App.4th 1310 (2013) .....	19, 20
3	<i>Scholl v. Mnuchin,</i>	
4	489 F.Supp.3d 1008 (N.D. Cal. 2020) .....	7
5	<i>Scott v. Pasadena Unified Sch. Dist.,</i>	
6	306 F.3d 646 (9th Cir. 2002) .....	8
7	<i>Sherwin-Williams Co. v. City of Los Angeles,</i>	
8	4 Cal.4th 893 (1993) .....	18
9	<i>Sierra Club v. United States Army Corps of Eng'rs,</i>	
10	990 F.Supp.2d 9 (D.C. Cir. 2013) .....	9
11	<i>Sprewell v. Golden State Warriors,</i>	
12	266 F.3d 979 (9th Cir. 2001) .....	6
13	<i>Stimmel v. Sessions,</i>	
14	879 F.3d 198 (6th Cir. 2018) .....	12
15	<i>Sunset Amusement Co. v. Bd. of Police Comm'rs,</i>	
16	7 Cal.3d 64 (1972) .....	17
17	<i>Thomas v. Anchorage Equal Rights Comm'n,</i>	
18	220 F.3d 1134 (9th Cir. 2000) (en banc) .....	6
19	<i>Toilet Goods Ass'n, Inc. v. Gardner,</i>	
20	387 U.S. 158 (1967) .....	7
21	<i>Torcivia v. Suffolk Cty., New York,</i>	
22	17 F.4th 342 (2d Cir. 2021) .....	12
23	<i>Turner Broad. Sys., Inc. v. FCC,</i>	
24	520 U.S. 180 (1997) .....	13
25	<i>United States v. Chovan,</i>	
26	735 F.3d 1127 (9th Cir. 2013) .....	10, 12, 13
27	<i>United States v. Gila Valley Irr. Dist.,</i>	
28	31 F.3d 1428 (9th Cir. 1994) .....	8
	<i>United States v. Masciandaro,</i>	
	638 F.3d 458 (4th Cir. 2011) .....	15
	<i>United States v. Power Co.,</i>	
	2008 WL 2626989 (D. Nev. June 26, 2008) .....	8
	<i>Vieux v. Easy Bay Reg'l Park Dist.,</i>	
	906 F.3d 1330 (9th Cir. 1990) .....	8

1	<i>Ward v. Rock Against Racism</i> ,	
2	491 U.S. 781 (1989).....	11
3	<i>Wash. State Grange v. Wash. State Republican Party</i> ,	
4	552 U.S. 442 (2008).....	9, 10, 17
5	<i>Westlands Water Distrib. Dist. v. Nat. Res. Defense Council</i> ,	
6	276 F.Supp.2d 1046 (E.D. Cal. 2003).....	24
7	<i>Young v. Hawaii</i> ,	
8	992 F.3d 765 (9th Cir. 2021) (en banc) .....	9, 11
9	<b>Statutes</b>	
10	Cal. Gov. Code § 53071.....	18
11	Cal. Pen. Code § 25605.....	18
12	Ordinance.....	<i>passim</i>
13	Ordinance. ¶ 26 .....	2
14	San Jose Ordinance (“Ordinance”) .....	1
15	<b>Other Authorities</b>	
16	First Amendment .....	<i>passim</i>
17	Second Amendment .....	<i>passim</i>
18	Cal. Const., Art. XIII C, § 1.....	19, 20
19	California Constitution.....	2, 19
20	California Constitution Article XI, Section 5(a).....	18
21	California Constitution Article XI, Section 7 .....	17
22	California Constitution Article XIII C.....	19
23	NAGR Press Release, <i>National Association for Gun Rights Files Lawsuit Against</i> <i>the City of San Jose</i> (Jan. 26, 2022), available at <a href="https://tinyurl.com/2p89jdu5">https://tinyurl.com/2p89jdu5</a> .....	2
24	NAGR Website, <i>Frequently Asked Questions</i> ,	
25	<a href="https://nationalgunrights.org/resources/faqs/">https://nationalgunrights.org/resources/faqs/</a> (accessed Apr. 5, 2022) .....	2
26	6 Wright & Miller, FED. PRAC. & PROC. § 1473 (3d ed. 2021) .....	23
27	Charters Budgetary Procedures:	
28	§§ 300, 700.....	22
	§ 411.....	23



1	§§1204, 1206, and 1207 .....	21
2	§ 1207.....	22
3	<b>Rules</b>	
4	Federal Rules of Civil Procedures:	
	Rule 12(b)(1).....	6, 7, 24
5	Rule 12(b)(6).....	2, 6, 10, 24
6	Rule 15(a).....	23
	Rule 15(d) .....	23
7	<b>Ordinances:</b>	
8	§ 10.32.200(A) .....	3
9	§§ 10.32.215, 10.32.235(A), 10.32.240(B).....	3
10	§ 10.32.200(B)(10)-(13).....	3
	§ 10.32.200(B)(11).....	3
11	§ 10.32.200(B)(4)-(10).....	3
	§ 10.32.255(A)-(C) .....	3
12	§ 10.32.235(A)(4) .....	3
	§ 10.32.210(A), (C).....	4
13	§ 10.32.220(B)(11)-(12).....	4
	§ 10.32.235(A)(1) .....	4
14	§§10.32.215, 10.32.220(A) .....	4
15	§ 10.32.200(B)(13).....	4
	§ 10.32.220(A)(1)-(5) .....	4
16	§ 10.32.205(B) .....	4
	§ 10.32.200(B)-(C).....	4
17	§ 10.32.215.....	5, 21
	§ 10.32.235(A)(2) .....	5
18	§ 10.32.230(A)-(B) .....	5
19	§ 10.32.230(A) .....	5
	§ 10.32.240(A) .....	5
20	§ 10.32.240(B) .....	5
	§ 10.32.245.....	5
21	§§ 10.32.215, 10.32.240(B) .....	7
	§ 10.32.235(A) .....	7
22	§ 10.32.220(B) .....	9, 16
23	§§ 10.32.210(A), 10.32.215, 10.32.220 .....	11
	§§ 10.32.210(A), 10.32.215 .....	12
24	§ 10.32.200(B) .....	12
	§ 10.32.200(B)(6).....	13
25	§ 10.32.200(B)(8).....	14
	§§ 10.32.225(C), 10.32.235(A)(4) .....	14
26	§ 10.32.225(B) .....	19
27	§§ 10.32.215, 10.32.220.....	20
	§ 10.32.305(B) .....	22
28	§ 10.32.220(C) .....	22

Case 5:22-cv-00501-BLF Document 36 Filed 04/08/22 Page 10 of 34

1	§ 10.32.220(C) .....	22
2	§ 10.32.235 (A), <i>et seq.</i> .....	22
3	§ 10.32.235.....	23
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**I. INTRODUCTION**

The San Jose Ordinance (“Ordinance”) at issue in this action springs from the legitimate authority of Defendant City of San Jose (“City” or “San Jose”) to enact legislation aimed at reducing gun deaths and injuries and compensating victims of accidental shootings. The City believes that smart, innovative policies informed by public health experts and gunowners alike can reduce firearm-related deaths and injuries, while fully respecting lawful gunowners’ Second Amendment rights to keep and bear arms for self-defense. State and local governments must be granted leeway to address the complex challenge of reducing the ever-increasing numbers of gun-related deaths and injuries.

The Ordinance here requires non-exempted San Jose gunowners to obtain liability insurance for gun accidents and to pay a reasonable annual Gun Harm Reduction Fee (“Fee”), which a nonprofit organization will use to provide gunowners and their families with voluntary programming and services related to gun safety, mental health, and domestic violence. Notwithstanding the Ordinance’s modest scope, Plaintiffs seek to strike it down. The lead Plaintiff in this case is the National Association for Gun Rights (“NAGR”), which calls itself the nation’s largest “no compromise” pro-gun organization and is opposed to the existence of any law that regulates firearms in any way. Their operative First Amended Complaint (“FAC”) is legally defective and should be dismissed on two grounds.

First, Plaintiff’s claims fail under Federal Rule of Civil Procedure (“Rule”) 12(b)(1) for lack of standing and ripeness, because key components of the Ordinance, which bear directly on the validity of Plaintiffs’ claims, have not yet been decided by the City. For example, Plaintiffs’ FAC rests on the theory that the annual Fee is a substantial and unconstitutional burden on the right to keep and bear arms—even though the amount of the Fee has not yet been set, and even though the criteria for the Ordinance’s “financial hardship” exemption have not yet been established. Similarly, Plaintiffs’ FAC is premised on speculation that the nonprofit organization referenced in the Ordinance (which the City Manager has not yet designated) will harbor anti-gun views and discourage gun ownership. Plaintiffs’ abstract objections to these and other aspects of

the law rest on speculation, contingent future events, and hypotheticals that would require this Court to issue an advisory opinion about an ordinance that is still incomplete and unfinished.

Second, under Rule 12(b)(6), all six of Plaintiffs' claims under the First and Second Amendment to the U.S. Constitution, the California Constitution (Proposition 26), and the San Jose City Charter are legally defective under binding precedent or otherwise collapse under scrutiny. Because there are no facts Plaintiffs could allege to cure those defects, all six claims should be dismissed with prejudice.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. History of the Ordinance and Procedural Posture

In June 2021, the City's mayor and City Council directed the City Attorney to draft a gun safety ordinance designed to mitigate gun harms for Council's consideration. *See* Decl. of Tamarah Prevost ("Prevost Decl.") ¶ 2, Ex. 1. Six months and seven detailed memoranda later, the Council, at its January 25, 2022 meeting, heard a first reading of the draft ordinance, directed that it be published, that certain amendments be drafted, and voted to re-consider the Ordinance at a later date. *Id.* ¶¶ 3-9, Exs. 2-8.

That same day, Plaintiffs NAGR and Mark Sikes, filed this lawsuit seeking to invalidate the Ordinance, even though it was still being negotiated and drafted. ECF 1; *see also* NAGR Press Release, *National Association for Gun Rights Files Lawsuit Against the City of San Jose* (Jan. 26, 2022), available at <https://tinyurl.com/2p89jdu5> (NAGR denouncing "new ordinance" as "tyrannical"). "Unlike other groups such as the NRA, NAGR believes in absolutely NO COMPROMISE on gun rights issues." NAGR Website, *Frequently Asked Questions*, <https://nationalgunrights.org/resources/faqs/> (accessed Apr. 5, 2022).

On February 4, 2022, Defendants moved to dismiss the Complaint for lack of jurisdiction. ECF 17. On February 8, the City enacted the Ordinance. ¶ 26.<sup>1</sup> The Ordinance expressly leaves key aspects of the law unspecified and dependent on future action by the City Council and City

<sup>1</sup> "¶" on its own refers to a paragraph of the FAC.

1 Manager (§§ 10.32.215, 10.32.235(A), 10.32.240(B)),<sup>2</sup> which the FAC repeatedly concedes (*see*  
 2 ¶¶ 1, 36-37, 90-91). The Ordinance provides the Council and City Manager 180 days to take those  
 3 actions before the Ordinance becomes effective on August 7, 2022. § 2. On February 14, before  
 4 the Council or City Manager had taken any of those further actions, Plaintiffs filed their FAC  
 5 (ECF 19), and the Court terminated the motion to dismiss the Complaint as moot (ECF 21). Three  
 6 weeks later, Plaintiffs filed a motion for preliminary injunction that mirrors their FAC in  
 7 substance, and which is now fully briefed and set to be heard on July 21, 2022. ECF 25, 28, 31-32.

#### 8 **B. Summary of the Ordinance**

9 The Ordinance's basic purpose is to "reduce gun harm" "for the protection of the welfare,  
 10 peace, and comfort of the residents of the City of San Jose." § 10.32.200(A). To "reduce the  
 11 number of gun incidents," the Ordinance seeks to provide voluntary gun safety and other  
 12 "[p]rograms and services to gun owners and their households" and to require gunowners to obtain  
 13 liability insurance to compensate victims of accidental shootings, which is partly informed by an  
 14 analogue to the success of car insurance mandates in helping reduce vehicle collision fatalities and  
 15 injuries. § 10.32.200(B)(10)-(13); *see also* § 10.32.200(B)(11) (finding risk-based automobile  
 16 liability insurance mandates were part of "a comprehensive public health approach to car safety"  
 17 that helped reduce U.S. motor vehicle collision fatalities by 80%). The Ordinance is informed by  
 18 public health research and data, such as findings that more than a third of all gun injuries are from  
 19 unintentional shootings, that gunowners and those who live with them are at significantly higher  
 20 risk of gun suicide and homicide than the rest of the population, and that gun-related deaths or  
 21 serious bodily injuries cost San Jose residents \$442 million per year. § 10.32.200(B)(4)-(10).

22 The Ordinance applies to all City residents who own a gun, with three exceptions:  
 23 (1) peace officers, (2) those with a state concealed weapon license, and (3) those for whom  
 24 compliance with the Ordinance would create a "financial hardship." § 10.32.255(A)-(C). With  
 25 respect to the latter, the Ordinance authorizes the City Manager to "promulgate [] regulations" on  
 26 "[t]he criteria by which a person can claim a financial hardship exemption." § 10.32.235(A)(4).

27  
 28 <sup>2</sup> "§\_" on its own refers to a section of the Ordinance, which is attached as Exhibit K to the FAC.

1 The City Manager has not yet promulgated these regulations. *See* Decl. of Sarah Zarate, City  
 2 Manager’s Office (“CMO Decl.”) ¶¶ 4-8. With respect to all non-exempt persons, the Ordinance  
 3 imposes three main requirements.

#### 4 **1. Liability Insurance Requirement**

5 First, gunowners must obtain “a homeowner’s, renter’s or gun liability insurance policy ...  
 6 specifically covering losses or damages resulting from any accidental use of the Firearm, including  
 7 but not limited to death, injury or property damage” within 30 days of the Ordinance taking effect  
 8 (i.e., September 7, 2022) or a later date prescribed by regulation. § 10.32.210(A), (C). The purpose  
 9 of the liability insurance requirement is to ensure victims of accidental shootings have access to  
 10 compensation, and to leverage private insurance market forces as a means of “encouraging safer  
 11 behavior.” § 10.32.220(B)(11)-(12). The Ordinance authorizes the City Manager to “promulgate []  
 12 regulations” on “[p]rocesses and procedures related to the implementation of the liability insurance  
 13 requirement, and forms necessary thereto,” which it must complete before the Ordinance can be  
 14 fully effectuated. § 10.32.235(A)(1); CMO Decl. ¶¶ 4-8.

#### 15 **2. Annual Gun Harm Reduction Fee**

16 Second, gunowners must pay an annual Fee to make available voluntary programming and  
 17 services to gunowner residents, “to members of their household, or to those with whom they have  
 18 a close familiar or intimate relationship” (§§10.32.215, 10.32.220(A)) with the goal of  
 19 “encourage[ing] safer behavior” related to gun ownership and use (§ 10.32.200(B)(13)). The  
 20 programs and services will focus on suicide prevention, violence reduction and gender-based  
 21 violence, addiction intervention and substance abuse treatment, mental health services related to  
 22 gun violence, and firearms safety education or training. § 10.32.220(A)(1)-(5). These programs  
 23 and services will be provided to qualifying City residents by a nonprofit organization to be  
 24 designated by the City Manager. § 10.32.205(B); CMO Decl. ¶ 6. While the City may not  
 25 “specifically direct” how the nonprofit spends monies from the Fee, the Ordinance is clear that  
 26 “[n]o portion of the monies ... shall be used for litigation, political advocacy, or lobbying  
 27 activities.” § 10.32.200(B)-(C).

1 The Ordinance does not set the amount of the Fee but leaves that to be “established by  
 2 [separate] resolution of the City Council.” § 10.32.215. *Accord* ¶¶ 1, 36, 90-91 (alleging that,  
 3 under Ordinance, Fee amount is “unspecified” and City Council must “determine the fee amount at  
 4 a later date”). To date, no such resolution has been passed. CMO Decl. ¶¶ 7-8. The Ordinance also  
 5 authorizes the City Manager to “promulgate [] regulations” concerning the “[d]esignation of the  
 6 nonprofit organization that will receive the [Fee], any processes and procedures related to the  
 7 payment of the fee, and any additional guidelines or auditing of the use of the monies from the fee”  
 8 (§ 10.32.235(A)(2)), as well as the annual due date for payment of the Fee (§ 10.32.215). The City  
 9 Manager has not yet promulgated these regulations. CMO Decl. ¶¶ 7-8. *Accord* ¶¶ 1, 37, 91  
 10 (conceding nonprofit has not yet been designated and characterizing services to be provided as  
 11 “unspecified programs”).

### 12 3. Self-Certification of Compliance

13 Third, much in the same way car owners must document their compliance with liability  
 14 insurance and annual registration fee requirements, the Ordinance requires gunowners to complete  
 15 a “City-designated attestation form” that states basic information about their gun liability insurance  
 16 and to keep that form and “proof of payment of the [Fee]” “with the[ir] Firearms where they are  
 17 being stored or transported.” § 10.32.230(A)-(B). Gunowners must also produce the form and  
 18 proof of payment “when lawfully requested to do so by a peace officer.” § 10.32.230(A). The City  
 19 Manager has not yet designated the attestation form. CMO Decl. ¶ 5.

20 Violations of the Ordinance are punishable by an administrative citation and fine, subject to  
 21 due process protections. § 10.32.240(A). Similar to the Fee, the Ordinance does not set the amount  
 22 of the administrative fine but leaves that to be “established by [separate] resolution of the City  
 23 Council.” § 10.32.240(B). To date, no such resolution has been passed. CMO Decl. ¶¶ 7-8. *Accord*  
 24 ¶¶ 17, 90 (conceding fine amount is presently “unspecified”). Contrary to Plaintiffs’ allegations  
 25 that the Ordinance authorizes the “seizure of firearms” of those who fail or refuse to comply with  
 26 the Ordinance (¶¶ 3, 44), the Ordinance only authorizes the “impoundment” of firearms and only  
 27 “to the extent allowed by law” (§ 10.32.245). There is currently no lawful basis to impound  
 28 firearms under state or federal law, meaning this particular provision will not take effect until, for

example, the passage of a state law permitting municipalities to impound firearms. The Ordinance also contains a severability clause. § 3.

### III. LEGAL STANDARDS

#### A. Rule 12(b)(1)

The plaintiff bears the burden of establishing the Court has jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).<sup>3</sup> The Court’s proper role is “to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution,” which means it lacks jurisdiction “to issue advisory opinions [ ] or to declare rights in hypothetical cases.” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). The doctrine of ripeness “prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Id.* Ripeness “is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). “A Rule 12(b)(1) jurisdictional attack may be facial or factual,” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The City primarily makes a facial attack, that “the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.” *Id.* To the extent the Court deems any part of the City’s argument to represent a factual attack disputing the truth of Plaintiffs’ allegations purporting to establish federal jurisdiction, the court “need not presume the truthfulness of the plaintiff’s allegations” and “may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment.” *Id.*

#### B. Rule 12(b)(6)

Defendants are entitled to dismissal under Rule 12(b)(6) if, accepting Plaintiffs’ allegations as true, the complaint fails to state a claim. *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The Court should not accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Plaintiffs’ “obligation to provide the ‘grounds’ of [their]

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<sup>3</sup> Unless otherwise noted, internal citations, alterations, and quotations are omitted.



‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The allegations must be “more than an unadorned, the-defendant-unlawfully-harmed-me accusation,” and “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

#### IV. ARGUMENT

##### A. THE COURT SHOULD DISMISS THE FAC UNDER RULE 12(b)(1).

###### 1. The FAC Fails for Lack of Ripeness.

The Ordinance was enacted in February 2022, but it expressly provides a 180-day period before it becomes effective on August 7, 2022 (§ 2), during which time the Council would need to pass resolutions setting the amount of the Fee and any administrative fine (§§ 10.32.215, 10.32.240(B)), and the City Manager would promulgate key regulations, such as those establishing the criteria for the financial hardship exemption and designating the nonprofit organization (§ 10.32.235(A)). *See generally* CMO Decl. Since the Ordinance is not yet “effective,” and since none of the required resolutions or regulations have yet been passed or promulgated, Plaintiffs’ claims are not ripe for review. *See Scholl v. Mnuchin*, 489 F.Supp.3d 1008, 1024-27 (N.D. Cal. 2020).

Ripeness is justiciability doctrine that looks primarily at two considerations: “the hardship to the parties of withholding court consideration” and “the fitness of the issues for judicial decision.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The “basic rationale” of the ripeness requirement is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements” (*id.* at 148), and to ensure that challenges to laws are “test[ed] ... in a concrete situation” (*Toilet Goods Ass’n, Inc. v. Gardner*, 387 U.S. 158, 165 (1967)). Pre-enforcement challenges to laws are not ripe for judicial review if it is likely that the law will change before it goes into effect. *See, e.g., Cramer v. Brown*, 2012 WL 13059699, at \*3 (C.D. Cal. Sept. 12, 2012) (finding pre-enforcement claim justiciable, in part, because the legislature “ha[d] no power to amend the statute before its effective date” and there was “no reason

1 to think the law change”). Additionally, an issue “may not be ripe for review if further factual  
 2 development would significantly advance [the court’s] ability to deal with the legal issues  
 3 presented.” *Nat’l Park Hosp. Assn. v. Dep’t. of Interior*, 538 U.S. 803, 812 (2003); *see also*  
 4 *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122-23 (9th Cir. 2010) (case not ripe  
 5 if it “involves uncertain or contingent future events that may not occur as anticipated, or indeed  
 6 may not occur at all”); *Vieux v. Easy Bay Reg’l Park Dist.*, 906 F.3d 1330, 1344 (9th Cir. 1990)  
 7 (federal courts may not issue advisory opinions based on a “hypothetical state of facts”).

8 “The prudential considerations of ripeness are amplified when constitutional considerations  
 9 are concerned.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (“*Scott*”).  
 10 Indeed, “[t]he Supreme Court has neatly instructed that the jurisdiction of federal courts to hear  
 11 constitutional challenges should be exercised only when the underlying constitutional issues [are  
 12 tendered] in clean-cut and concrete form.” *Id.* (quoting *Rescue Army v. Mun. Ct. of Los Angeles*,  
 13 332 U.S. 549, 584 (1947)). In *Scott*, for example, the Ninth Circuit determined that an equal  
 14 protection challenge to an admissions policy was not ripe because it lacked a “basis to infer” how  
 15 the policy’s criteria was to be implemented. 306 F.3d at 663. And “[w]ithout knowing the  
 16 conditions under which the policy was to be implemented, no court can make a true determination  
 17 as to whether the policy” passes constitutional muster. *Id.*

18 Here, Plaintiffs’ claims are not ripe for precisely the same reasons Plaintiffs repeatedly  
 19 emphasize on the face of the FAC—i.e., because key aspects of the Ordinance that Plaintiffs  
 20 challenge have not yet been established. *See, e.g.*, ¶¶ 1, 36-37, 90-91. For example, Plaintiffs  
 21 challenge the constitutionality of the insurance and Fee requirements as an unconstitutional burden  
 22 on Second Amendment rights, even Plaintiffs’ allege the amount of the Fee and the cost of the  
 23 required insurance is “as yet unknown.” ¶¶ 1, 90. This is precisely the kind of situation in which it  
 24 is “premature” to ask a federal court “to issue a binding interpretation of a local ordinance based  
 25 on what might happen in the future without first giving the City ... the opportunity to interpret its  
 26 own ordinance.” *United States v. Power Co.*, 2008 WL 2626989, at \*4 (D. Nev. June 26, 2008).  
 27 Since claims are not ripe when based on “mere speculation” as to what a future regulatory decision  
 28 will be (*United States v. Gila Valley Irr. Dist.*, 31 F.3d 1428, 1436 (9th Cir. 1994)), they certainly

are not ripe when the plaintiffs’ own complaint admits that necessary legislative action and rulemaking has not yet occurred, and plaintiffs have no idea what the content of those items will be. *See, e.g.*, ¶¶ 1, 36-37, 90-91. As for Plaintiffs’ speculative fears that firearms will be “seized” and onerous fines imposed, that also is not ripe for review because it “rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Young v. Hawaii*, 992 F.3d 765, 828 (9th Cir. 2021) (en banc) (“*Young*”).

Similarly, Plaintiffs’ First Amendment challenge is based on allegations that the “yet-to-be-determined nonprofit” will “likely” be “dedicated to exclusively preaching the negative risks of gun ownership,” and that it will administer “unspecified programs” and “activities of ideological or political nature with which Plaintiffs disagree,” such as “endorsing gun control.” ¶¶ 6, 53, 62-63, 112. This is all speculation that ignores the Ordinance’s express limitations on the nonprofit’s activities. § 10.32.220(B) (expressly prohibiting nonprofit from spending any “portion of the monies from the [Fee]” on “litigation, political advocacy, or lobbying activities”). Plaintiffs’ speculation about the “likely” views and activities of the yet-to-be-determined nonprofit is also devoid of factual support. *See Sierra Club v. United States Army Corps of Eng’rs*, 990 F.Supp.2d 9, 31-32 (D.C. Cir. 2013) (grounds for preliminary injunction not ripe where the complained-of conduct “has not yet occurred and is still in the process of being addressed”).

## 2. The FAC Does Not State a Proper Facial Constitutional Challenge.

In addition to being unripe for review, Plaintiffs’ facial challenge to the Ordinance should be rejected for other reasons. Courts may not “resolve questions of constitutionality with respect to each potential situation that might develop” in litigation, especially when the moving party does not demonstrate that the law “would be unconstitutional in a large fraction of relevant cases.” *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007). Because constitutional facial challenges “often rest on speculation” (*Jackson v. City and County of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014) (“*Jackson*”)), “they raise the risk of premature interpretations of statutes on the basis of factually barebones records,” and “threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner inconsistent with the Constitution” (*Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51

(2008)). To be successful, a facial challenge must show that “no set of circumstances exists under which the [law] would be valid, i.e., that the law is unconstitutional in all of its applications,” or at least that it lacks a “plainly legitimate sweep.” *Id.* at 449.

Plaintiffs fail to allege facts establishing that the Fee would be unconstitutional in a “large fraction” of cases, especially since the amount of the Fee has not even been determined yet. Assuming the Council and City Manager establish constitutionally reasonable fees, fines, and regulations, the Ordinance’s sweep is plainly legitimate because it furthers the City’s legitimate efforts to reduce the harm caused by gun-related accidents and imposes only de minimus or marginal burdens on the constitutional right to obtain a keep a firearm in the home for self-defense. *Cf. Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840 (2013) (rejecting facial challenge to ordinance that regulated gun shows “only minimally and only on county property,” without even requiring empirical support justifying the regulation). Plaintiffs’ FAC should be dismissed for this reason alone.

## **B. THE COURT SHOULD DISMISS THE FAC UNDER RULE 12(b)(6).**

### **1. Plaintiffs Fail to State a Second Amendment Claim.**

Plaintiffs contend the Ordinance impermissibly burdens the Second Amendment rights of City residents to whom the Ordinance applies. ¶¶ 45-49. The Ninth Circuit adjudicates Second Amendment challenges using a two-step test, which “(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.” *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). For purposes of this Motion, Defendants concede the Ordinance imposes some minimal or slight burden, and so proceed to the second step of the test. *See e.g., Heller*, 554 U.S. at 625; *Jackson*, 746 F.3d at 959.

#### **a. The Appropriate Level of Scrutiny is Intermediate Scrutiny.**

To determine the appropriate level of scrutiny, Courts look to two factors. First, Courts assess how close the law comes to the core of the Second Amendment right, which is the right to keep firearms in the home for purposes of self-defense. *Heller*, 554 U.S. at 629; *Jackson*, 746 F.3d at 963. Unless the challenged law “implicates the core of the Second Amendment right and severely burdens that right,” courts in the Ninth Circuit generally apply intermediate scrutiny.

1 *Young*, F.3d 765 at 784; *see also Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir.  
 2 2011) (“*Heller II*”) (“[A] regulation that imposes a substantial burden upon the core right of self-  
 3 defense protected by the Second Amendment must have a strong justification, whereas a regulation  
 4 that imposes a less substantial burden should be proportionately easier to justify.”). Here,  
 5 intermediate scrutiny applies because the Ordinance does not “impos[e] restrictions on the use of  
 6 handguns within the home” or otherwise come close to regulating the core Second Amendment  
 7 right of keeping firearms in the home for self-defense. *Jackson*, 746 F.3d at 963. The Ordinance  
 8 merely requires resident gunowners to obtain liability insurance to provide a mechanism for  
 9 compensating victims of accidental gun injuries, and to pay a reasonable Fee to fund services  
 10 aimed at reducing well-established harms that result from guns being present in the home.  
 11 §§ 10.32.210(A), 10.32.215, 10.32.220.

12 The second factor of the scrutiny evaluation requires the Court to assess the “severity of the  
 13 law’s burden” on the core Second Amendment right. *Jackson*, 746 F.3d at 963. A law that  
 14 “severely burdens that right receives strict scrutiny,” but in all “other cases in which Second  
 15 Amendment rights are affected in some lesser way, we apply intermediate scrutiny.” *Young*, 992  
 16 F.3d at 784. Laws that regulate only the “manner in which persons may exercise their Second  
 17 Amendment rights” are obviously less burdensome than those which ban firearm possession  
 18 completely. *Jackson*, 746 F.3d at 961 (citing *Chovan*, 735 F.3d at 1138). Similarly, “firearm  
 19 regulations which leave open alternative channels for self-defense are less likely to place a severe  
 20 burden on the Second Amendment right than those which do not. *Jackson*, 746 F.3d at 961; *see*  
 21 *also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that laws placing “reasonable  
 22 restrictions on the time, place, or manner of protected speech” and that “leave open alternative  
 23 channels” for communication pose less burden to a First Amendment right and are reviewed under  
 24 intermediate scrutiny).

25 Here, the burden the Ordinance imposes is minimal: it neither regulates the use of firearms,  
 26 how or where they are stored, nor any other factors evaluated by courts as directly affecting  
 27 residents’ ability to keep and bear arms for self-defense. *See e.g., Heller*, 554 U.S. at 629. Instead,  
 28 it merely requires gunowners to obtain insurance and pay a reasonable annual Fee.

§§ 10.32.210(A), 10.32.215. The Ordinance neither seeks to ban guns nor threatens to seize them. Indeed, the Ninth Circuit (in line with the other Circuits) has long applied intermediate scrutiny to uphold similar laws. *See, e.g., Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) (upholding DOJ’s use of gun sale fee for enforcement efforts targeting illegal firearm possession after point of sale under intermediate scrutiny); *Heller v. District of Columbia*, 801 F.3d 264, 278 (D.C. Cir. 2015) (“*Heller III*”) (upholding \$48 in gun licensing fees under intermediate scrutiny); *Kwong v. Bloomberg*, 723 F.3d 160, 161, 167 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) (upholding \$340 gun licensing fee under intermediate scrutiny); *O’Connell v. Gross*, No. CV 19-11654-FDS, 2020 WL 1821832 (D. Mass. Apr. 10, 2020) (upholding law requiring mandatory safety courses and \$300 in fees under intermediate scrutiny). Intermediate scrutiny is appropriate.

**b. The Ordinance Easily Survives Intermediate Scrutiny.**

To withstand intermediate scrutiny, the City need only show (1) that their stated objective is significant, substantial, or important; and (2) a reasonable fit between the Ordinance and that objective. *Chovan*, 735 F.3d at 1139.

First, the City’s objective of promoting public safety and addressing gun injuries is an “important” government interest. *Chovan*, 735 F.3d at 1139; *see also Fyock*, 779 F.3d at 1000 (it is “self-evident” that government’s interest in promoting public safety and reducing violent crime are substantial and important government interests”); *Stimmel v. Sessions*, 879 F.3d 198, 201 (6th Cir. 2018) (referring to “government’s compelling interest of preventing gun violence”); *Torcivia v. Suffolk Cty., New York*, 17 F.4th 342, 359 (2d Cir. 2021) (finding a “substantial governmental interest in preventing suicide and domestic violence”). The Ordinance’s other stated purpose of reducing the social and financial costs caused by guns (§ 10.32.200(B)) is also an important interest. *See, e.g., Bauer*, 858 F.3d at 1226; *Kwong*, 723 F.3d at 168 (city permitted to recover costs as part of scheme “designed to promote public safety and prevent gun violence”). There can be no serious doubt that gun violence is a major public health crisis. *See* U.S. Centers for Disease Control and Prevention, *Firearm Violence Prevention*, available at <https://www.cdc.gov/violenceprevention/firearms/fastfact.html> (accessed Apr. 6, 2022) (deeming

1 firearm injuries a “serious public health problem.”). Thus, the Ordinance clearly meets the first  
2 prong under intermediate scrutiny.

3 Second, there is a reasonable fit between the challenged regulation and the City’s objective.  
4 *See Chovan*, 735 F.3d at 1139. When assessing the reasonableness of fit under immediate scrutiny,  
5 courts must give “substantial deference to the predictive judgments” of the legislature on public  
6 policy questions that fall outside the courts’ competence. *Turner Broad. Sys., Inc. v. FCC*, 520  
7 U.S. 180, 195 (1997) (“*Turner IP*”). This is because “the legislature is far better equipped than the  
8 judiciary to make sensitive public policy judgments (within constitutional limits)” on complex  
9 empirical questions like “the dangers in carrying firearms and the manner to combat those risks.”  
10 *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner Broad. Sys.,*  
11 *Inc. v. FCC*, 512 U.S. 622, 665 (1994) (“*Turner I*”). This Court’s “sole obligation” is simply “to  
12 assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based  
13 on substantial evidence.” *Turner II*, 520 U.S. at 181. That standard is easily met here.

14 The City’s reasonable legislative judgments are entitled to deference. Plaintiffs’ vaguely  
15 allege the Ordinance is “not a reasonable fit” with its stated aims of reducing gun injuries and  
16 reducing and offsetting some of the enormous social costs of gun injuries and violence in the City.  
17 *See* ¶¶ 52-56, 96. Simply because “primary costs” of gun violence are associated with City  
18 response costs does not detract from the City’s lawful goal (and authority) to prevent and reduce  
19 gun injuries and associated costs for the City and its residents in the first instance, with the goal of  
20 saving the City and its residents from ever incurring the related costs. That the Ordinance does not  
21 also seek to recover police or other response costs does not somehow invalidate it. And in any  
22 event, the PIRE study does include findings related to suicide and self-inflicted harm, which the  
23 Ordinance seeks to address.

24 Moreover, the City relied on several studies and findings to form its reasonable judgment  
25 that an insurance mandate will deter, prevent, or reduce accidental gun harm. *See e.g.*, Prevost  
26 Decl. ¶ 12, Ex. 11 (*The New England Journal of Medicine* article “Handgun Ownership and  
27 Suicide in California,” cited in Ordinance findings at § 10.32.200(B)(6)). The City also evaluated  
28 and reviewed materials concerning the civil liability and financial harm arising from gun violence.



1 *See id.* ¶ 13, Ex. 12 (The Educational Fund to Stop Gun Violence, “Unintentional Shootings”); *id.*  
2 ¶ 14, Ex. 13 (Hartford Courant, “Sandy Hook Families Settle Lawsuits Against Lanza Estate for  
3 \$1.5M”); *id.* ¶ 15, Ex. 14 (Gilman & Bedigian LLC, “Man who shot intruder in his home sued for  
4 wrongful death”). The Ordinance is also based on the City’s reasonable judgment that requiring  
5 gun liability insurance might be effective in reducing harm, relying on the useful analogue of  
6 automobile liability insurance. *See* § 10.32.200(B)(8) (noting “risk-adjusted premiums used by the  
7 automobile insurance industry reduced per-mail auto fatalities by 80% over the past five decades  
8 and saved 3.5 million lives”); Prevost Decl. ¶ 8, Ex. 7 (compendium of materials provided to City  
9 Council in advance its January 25, 2022 meeting).

10 This multitude of studies support the City’s view that the Ordinance’s insurance mandate,  
11 annual Fee requirement, and related education programming and services will positively improve  
12 public health, safety, and well-being. Indeed, a city is allowed “a reasonable opportunity to  
13 experiment with solutions to admittedly serious problems,” such as unintentional harm caused by  
14 firearms. *Jackson*, 746 F.3d at 966 (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41,  
15 52 (1986)). The Ordinance findings and legislative record more than sufficiently support the  
16 reasonableness of the fit between City’s important interests in deterring gun-related deaths and  
17 injuries and compensating victims of accidental shootings. *See City of Renton*, 475 U.S. at 51-52;  
18 *Jackson*, 746 F.3d at 969. Additionally, Plaintiffs are well-aware that the Mayor has publicly  
19 proposed a mere \$25 fee in a Memorandum provided for Council’s review. *See* Prevost Decl. ¶ 5,  
20 Ex. 4. Yet the FAC contains no non-conclusory allegations as to why such a minimal Fee would be  
21 an unconstitutional burden on Second Amendment rights. Nor do Plaintiffs’ claims account for the  
22 Ordinance’s “financial hardship” exemption, which would exempt from the Ordinance’s  
23 requirements any person who meets its yet-to-be-promulgated criteria. §§ 10.32.225(C),  
24 10.32.235(A)(4).

25 Ultimately, Plaintiffs’ allegations regarding the purported lack of a “reasonable fit”  
26 between the Ordinance and the City’s important interests are far too limited, ignore key provisions  
27 of the Ordinance, and ignore the deference due to a municipality’s reasonable legislative  
28 judgments. *See City of Renton*, 475 U.S. at 51-52 (municipality may rely on any evidence



1 “reasonably believed to be relevant” to substantiate its important interest in regulating speech);  
 2 *Jackson*, 746 F.3d at 969 (finding San Francisco’s evidence more than “fairly supports” its  
 3 conclusion that hollow point bullets are lethal).

4 Tellingly, Plaintiffs’ cited cases in its FAC (*see* ¶¶ 46-49, 86-87) striking down gun laws  
 5 are inapposite as they either concerned “handgun bans,” a far more severe burden than the  
 6 Ordinance here (*McDonald v. City of Chicago*, 561 U.S. 742, 750, 792 (2010); *District of*  
 7 *Columbia v. Heller*, 554 U.S. 570, 635 (2008)), or actually contradict their position. *See Nordyke v.*  
 8 *King*, 681 F.3d 1041, 1044-45 (9th Cir. 2012) (en banc) (upholding constitutionality of ordinance  
 9 regulating display of guns at gun shows “no matter what form of scrutiny applies”); *United States*  
 10 *v. Masciandaro*, 638 F.3d 458, 459-60 (4th Cir. 2011) (upholding constitutionality of federal law  
 11 prohibiting carrying or possessing a loaded handgun in a motor vehicle in a national park area);  
 12 *Bauer*, 858 F.3d 1216 (upholding California law requiring payment of \$19 fee on every firearm  
 13 sale conducted in the state because of the “minimal nature of the burden” and plaintiff’s failure to  
 14 show the fee “has any impact on [his] actual ability to obtain and possess a firearm”); *Kwong*, 723  
 15 F.3d at 161, 167 (upholding mandatory \$340 three-year gun license fee because it imposed merely  
 16 a “marginal, incremental, or [] appreciable [but not substantial] restraint” on Second Amendment  
 17 rights, “especially considering that plaintiffs [] put forth no evidence ... that the fee is prohibitively  
 18 expensive”). Like the plaintiffs in *Bauer* and *Kwong*, Plaintiffs’ FAC provides no facts on the cost  
 19 of the liability insurance or annual fee requirements, nor that the Ordinance’s “financial hardship”  
 20 exception under Section 10.32.225(C) would fail to fully address this concern.

21 Rather, Plaintiffs rely on three decades-old First Amendment fee cases (¶¶ 1, 57-58, 85-  
 22 86), all of which are readily distinguishable. *See Minneapolis Star and Tribune Co. v. Minnesota*  
 23 *Comm’r of Rev.*, 460 U.S. 575, 591-92 (1983) (newspaper tax held unconstitutional because it was  
 24 “tailor[ed]” so that “a small group” of newspapers were required to pay enormous taxes); *Murdock*  
 25 *v. Pennsylvania*, 319 U.S. 105, 113-14 (1943) (striking down licensing fee that was “not a nominal  
 26 fee” properly imposed as a regulatory measure); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941)  
 27 (holding that fee imposed on a constitutional right cannot not be a general “revenue tax”). Indeed,  
 28 the Ninth Circuit has rejected the same argument Plaintiffs make here. *See Bauer*, 858 F.3d at 1225

(upholding constitutionality of California law imposing \$19 fee on all gun sales). The Ordinance is constitutional under *Bauer, Murdock, and Cox* because the Ordinance’s liability insurance and annual Fee requirements are carefully tailored to ensure they are not a general revenue tax, directly further the maintenance of public order in the matter regulated, and are even subject to a “financial hardship” exception. § 10.32.225(C). In sum, intermediate scrutiny applies, and the Ordinance clearly survives. Plaintiffs fail to state a claim under the Second Amendment.

## 2. Plaintiffs Fail to State a First Amendment Claim Based on Compelled Speech or Association.

Plaintiffs’ First Amendment claim is based on speculation that a yet-to-be-designated nonprofit with unknown leadership is likely hold anti-gun views and be hostile to the Second Amendment. ¶¶ 60-64. This claim should be dismissed as pure speculation and for ignoring, among other things, that the political advocacy that Plaintiffs fear the nonprofit might engage in is expressly prohibited by the Ordinance. § 10.32.220(B) (providing that no portion of the Fee may be used “for litigation, political activity, or lobbying activities”).

Additionally, Plaintiffs’ authorities cited in the FAC (i.e., a Thomas Jefferson quote and two Supreme Court decisions from disparate contexts) do not support their First Amendment claim that the Ordinance’s Fee requirement is compelled speech in violation of the First Amendment. ¶¶ 61, 63, 110-113. First, *Janus* concerns whether non-union public employees can be compelled to pay union dues to fund the unions’ political lobbying, advertising, litigation, and social and recreational activities, and other activities. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2459-61, 2480 (2018). *Janus*’s holding and reasoning are deeply rooted in the union context. *See, e.g., id.* at 2486 (“State and public sector unions may [not] extract agency fees from nonconsenting employees . . . [u]nless employees clearly and affirmatively consent[.]”). Second, Plaintiffs cite a case against the State Bar concerning the use of compulsory bar membership dues to engage in political activities, such as “lobbying for or against state legislation,” opposing federal legislation, and endorsing political measures. *See Keller v. State Bar of California*, 496 U.S. 1, 15 (1990).

Tellingly, Plaintiffs never explain why language and reasoning from these factually inapposite cases should be extracted from their highly specific public union and State Bar contexts

1 and applied to an entirely different scenario, where a legislature seeks funds for reasonable  
 2 measures to carry out its police powers to protect public health and safety. Nor do Plaintiffs cite  
 3 any cases in which a court has applied these cases in that context, much less relied on them (as  
 4 Plaintiffs do), to strike down a gun regulation. Plaintiffs' argument should be rejected for these  
 5 reasons alone. The core concern of the First Amendment compelled speech doctrine—i.e.,  
 6 prohibiting compelled speech and association in matters of political lobbying, advocacy, or  
 7 litigation—simply does not exist here. *See also Keller*, 496 U.S. at 12-13 (1990) (“If every citizen  
 8 were to have a right to insist that no one paid by public funds express a view with which he  
 9 disagreed, debate over issues of great concern to the public would be limited to those in the private  
 10 sector, and the role of government as we know it radically transformed.”).

11 Ultimately, Plaintiffs fail to plausibly allege that the Ordinance will compel speech with  
 12 which they do not agree—especially in view of federalism concern that federal courts should not  
 13 invalidate state laws on the grounds that they violate the right of association based only on “factual  
 14 assumptions.” *Wash. State Grange*, 552 U.S. at 457; *accord Cal. Democratic Party v. Jones*, 530  
 15 U.S. 567, 600 (2000) (Stevens, J., dissenting) (“[A]n empirically debatable assumption ... is too  
 16 thin a reed to support a credible First Amendment distinction” with respect to burdens on  
 17 association). Plaintiffs' First Amendment claim should be dismissed.

### 18 **3. Plaintiffs Fail to Sufficiently Allege State Law Preemption.**

19 Plaintiffs argue that the Ordinance is preempted by state law under Article XI, Section 7 of  
 20 the California Constitution. ¶¶ 65-69. Under that provision, a local ordinance that is “in conflict  
 21 with the general laws” is preempted and void, but a “city may make and enforce ... all local, ...  
 22 sanitary, and other ordinances ... not in conflict with general laws” under its police power. Cal.  
 23 Const., Art. XI, § 7. The “general rule” is that “ordinances will be upheld against constitutional  
 24 challenge if they are reasonably related to promoting the health, safety, comfort and welfare of the  
 25 public, and if the means adopted to accomplish that promotion are reasonably appropriate to the  
 26 purpose.” *Sunset Amusement Co. v. Bd. of Police Comm'rs*, 7 Cal.3d 64, 72 (1972). The Ordinance  
 27 here fits well within that general rule.

1           Additionally, under Article XI, Section 5(a) of the California Constitution, charter cities  
 2 (like San Jose) have the right to adopt ordinances that conflict with general state laws, provided the  
 3 subject of the ordinance is a “municipal affair” rather than one of “statewide concern.” As to  
 4 matters of “statewide concern,” charter cities remain subject to and controlled by applicable  
 5 general state laws only “if it is the intent and purpose of such general laws to occupy the field to  
 6 the exclusion of municipal regulation.” *Bishop v. City of San Jose*, 1 Cal.3d 56, 60-61 (1969). A  
 7 law is preempted if it “duplicates, contradicts, or enters an area fully occupied by general law,  
 8 either expressly or by legislative implication.” *Sherwin-Williams Co. v. City of Los Angeles*, 4  
 9 Cal.4th 893, 897-98 (1993).

10           Here, Plaintiffs do not argue that the Ordinance duplicates or contradicts state law. Instead,  
 11 they argue that “[g]un regulation is already fully occupied by the State of California.” ¶ 68.  
 12 Plaintiffs ignore that gun regulation as a whole has not been fully occupied by general law. *Great*  
 13 *Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 861 (Cal. 2002). Instead, the State  
 14 Legislature has expressly preempted only discrete areas of gun regulation, such as permitting,  
 15 licensing, and registration of firearms. *See* Cal. Pen. Code § 25605 (permitting and licensing); Cal.  
 16 Gov. Code § 53071 (registration and licensing). The State has neither expressly nor impliedly  
 17 preempted the entire field of gun regulation, or the discrete areas regulated by the Ordinance here  
 18 (e.g., firearm liability insurance, the provision of voluntary programming and services to gunowner  
 19 households to improve public health and safety). This impedes Plaintiffs’ preemption argument.

20           Additionally, Plaintiffs ignore the test for preemption. A local ordinance can only duplicate  
 21 or contradict state law if it addresses the exact same subject matter of the state law. In *Great*  
 22 *Western Shows*, for example, the California Supreme Court explained that, in a prior case, it had  
 23 “distinguished between licensing, which signifies permission or authorization, and registration,  
 24 which entails recording ‘formally and exactly’ and therefore declined to find express conflict  
 25 between the statute and the ordinance.” 27 Cal.4th at 860-61 (2002) (citing *Galvan v. Superior*  
 26 *Court*, 70 Cal.2d 851 (1969)). Here, the Ordinance has nothing to do with licensing. It neither  
 27 prevents nor expressly authorizes City residents to obtain gun licenses, prevents a law enforcement  
 28 official from issuing a license, or creates new or different requirements for obtaining a license.

1 Indeed, it expressly exempts from its requirements any gunowner with a concealed weapon license  
 2 under State law, indicating the City's intent not to encroach into State territory. § 10.32.225(B).  
 3 Permitting, licensing, and registration concern completely different subjects than the insurance  
 4 mandate contained within the Ordinance. *See Great Western Shows*, 27 Cal.4th at 860-61; *Galvan*,  
 5 70 Cal.2d 85.

6 Numerous California state courts have upheld gun regulations, rejecting preemption  
 7 arguments similar to those Plaintiffs make here. *See e.g., Calguns Foundation, Inc. v. County of*  
 8 *San Mateo*, 218 Cal.App.4th 661 (2013) (upholding county ban on gun possession in County  
 9 parks); *Cal. Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal.App.4th 1302 (1998)  
 10 (ordinance banning sale of "Saturday Night Special" handgun); *Olsen v McGillicuddy*, 15 Cal.  
 11 App. 3d 897 (1971) (upholding ordinance prohibiting gun possession in cars); *Great Western*  
 12 *Shows*, 27 Cal. 4th 853, 863 (2002) (upholding regulation of gun sales on municipal land).  
 13 Plaintiffs' state preemption argument is without merit and should be dismissed.

14 **4. Plaintiffs Fail to State a Claim that the Ordinance Imposes a Tax in**  
 15 **Violation of the California Constitution.**

16 Plaintiffs argue that the Ordinance's insurance mandate and Fee requirements are taxes that  
 17 may not be imposed without voter approval under California Constitution Article XIII C, as  
 18 amended by Proposition 26. ¶¶ 70-72. A tax is defined to include any levy, charge, or exaction of  
 19 any kind imposed by a local government. Cal. Const., Art. XIII C, § 1 ("Proposition 26").  
 20 Proposition 26 sets forth seven exemptions to this rule. *Id.* However, neither the insurance mandate  
 21 nor the Fee constitute a tax because (aside from modest administrative costs) none of the proceeds  
 22 from those requirements will pass into government hands. *See Schmeer v. County of Los Angeles*,  
 23 213 Cal.App.4th 1310 (2013).

24 In *Schmeer*, Los Angeles County enacted an ordinance that prohibited retail stores in  
 25 unincorporated areas of the county from providing disposable plastic carryout bags to customers.  
 26 213 Cal.App.4th at 1314. The stores could provide recyclable paper carryout bags but were  
 27 required to charge customers ten cents per bag. *Id.* Critically, the proceeds of the paper bag sales  
 28 were retained by the store—not the County—to be used for prescribed purposes, including to cover

the actual costs of the paper bags. *Id.* The *Schmeer* plaintiffs sued on the same theory advanced by Plaintiffs here: that the bag charge is a tax as defined by Proposition 26. The court ruled that because the proceeds of the bag charge are retained by the retail store and not remitted to the county, the voter approval requirements of Article XIII C, § 2 [were] therefore inapplicable.” *Id.* at 1326, 1329. Applied here, *Schmeer* makes clear that Plaintiffs’ failure to explain how money that never passes to the City could constitute a tax is fatal to their Proposition 26 claim. Under the Ordinance, all monies from payment of the annual Fee will go directly to the nonprofit organization, insurance premiums will be paid to insurance carriers, and insurance claims will be paid out to victims of accidental gun injuries. *See* §§ 10.32.215, 10.32.220. The City will receive none of the monies at issue.

*Schmeer* also defeats the Plaintiffs’ argument that the City must prove that the amount of the fees is no more than necessary to cover the reasonable costs of the governmental activity and that the manner in which those costs are allocated to a payor bear a reasonable relationship to the payor’s burdens on, or benefits from, the governmental activity. ¶ 42. But even if it did not, this argument would fail for the separate and independent reason that Fee money collected from gunowners would be fairly categorized under the exception from Proposition 26 for fees “imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged.” Cal. Const., Art. XIII C, § 1 (“specific benefit exemption”); *see also S. Cal. Edison Co. v. Pub. Util. Comm’n*, 227 Cal.App.4th 172, 200 (2014) (finding a public utility fee was “designed to benefit ... ratepayers” and “[t]he possibility that some EPIC research may incidentally provide a social benefit to the public at large does not transform EPIC into a tax where a discrete group, namely the utility corporations’ ratepayers, is specifically benefitted.”)

In sum, neither the insurance mandate nor the Fee is a tax under Proposition 26, and Plaintiffs’ claim should be dismissed.

##### 5. The Ordinance Does Not Violate the San Jose City Charter.

Plaintiffs allege that the Ordinance violates the San Jose City Charter (“Charter”) “by prohibiting the San Jose City Council from using its budgetary and appropriating powers to direct

1 how” the designated nonprofit expends the Fee, and by “divert[ing] a City fee to a nonprofit rather  
2 than the City’s General Fund.” ¶¶ 73-81. Both arguments fail.

3 When interpreting a California statute, Federal courts apply California rules of statutory  
4 construction. *Lares v. West Bank One*, 188 F.3d 1166, 1168 (9th Cir. 1999). The same rules of  
5 construction apply to local ordinances and city charters. *See 1300 N. Curson Investors, LLC v.*  
6 *Drumea*, 225 Cal.App.4th 325, 332 (2014); *Laurent v. City and County of San Francisco*, 99  
7 Cal.App.2d 707, 708 (1950). The language of the Charter and the Ordinance must be read in the  
8 context of the respective statutes as a whole. *See Isaakhani v. Shadow Glen Homeowners Assn.,*  
9 *Inc.*, 63 Cal.App.5th 917, 931-932 (2021); *City of San Jose v. Lynch*, 4 Cal.2d 760, 766 (1935).  
10 And when interpreting a statute, the court must “avoid a construction that would lead to  
11 impractical or unworkable results.” *Los Angeles Unified Sch. Dist. v. Garcia*, 58 Cal.4th 175, 194  
12 (2013). But read in context, the isolated the provisions of the Ordinance and the Charter upon  
13 which Plaintiffs rely do not support their conclusion.

14 ***a. The Charter Does Not Require Placing the Fee into the General***  
15 ***Fund.***

16 Plaintiffs ignore the first sentence of Section 1211 of the Charter, which states that “[a]ll  
17 monies paid into the San Jose City Treasury shall be credited to and kept in separate funds in  
18 accordance with provisions of this Charter or ordinance.” *Id.* When read together with the  
19 sentences that follow, it is clear the General Fund applies to “monies paid into the City Treasury.”  
20 *Id.* But the Ordinance requires that the Fee be paid to the designated nonprofit, not “paid into the  
21 City Treasury.” § 10.32.215.

22 ***b. The Fee is Not Subject to the Charter’s Budgetary Procedures.***

23 The premise of Plaintiffs’ argument, that the Ordinance “violates the [Charter’s]  
24 reservation of budgeting and appropriation power to the City Council,” is incorrect. Sections 1204,  
25 1206, and 1207 of the Charter do not apply to the Fee. All three sections concern the City’s  
26 budgetary process, which expressly applies to “City departments, offices, and agencies” – not the  
27 designated nonprofit or the Fee it receives. Charter §§ 1204, 1206, 1207. The nonprofit is not a  
28 City department, office, or agency. Indeed, “[n]o City official or employee shall sit on the board of



1 directors of the Designated Nonprofit Organization” (§ 10.32.305(B)), and the City “shall not  
2 specifically direct how the monies from the [Fee] are expended” (§ 10.32.220(C)).

3 The Ordinance does not provide for or contemplate using the Fee for the operation of City  
4 departments. § 10.32.220(C). Rather, the Ordinance requires the designated nonprofit to “spend  
5 every dollar generated from the [Fee]” on programs and initiatives within a particular category –  
6 none of which include the operation of offices, departments, or agencies of the City. *Id.*; *c.f.*  
7 Charter § 1207. Therefore, the Fee is not subject to the City’s budgetary process and Plaintiffs’  
8 argument fails on its premise.

9 *c. The Council Properly Delegated Regulatory Authority to the City*  
10 *Manager.*

11 The City Manager is the Chief Administrative Officer and head of the administrative  
12 branch of San Jose’s council-manager government. Charter §§ 300, 700. The City Manager is thus  
13 “responsible for the faithful execution of all laws, provisions of [the] Charter, and acts of the  
14 Council which are subject to enforcement by the City Manager or by officers who are under the  
15 City Manager’s direction and supervision.” *Id.* § 701(d).

16 The Council may lawfully delegate administrative or ministerial functions to the City  
17 Manager. *Sacramento Chamber of Commerce v. Stephens*, 212 Cal. 607, 610 (1931). It is  
18 sufficient that the Council “declare a policy, fix a primary standard, and authorize executive or  
19 administrative officers to prescribe subsidiary rules and regulations that implement the policy and  
20 standard and to determine the application of the policy or standard to the facts of particular cases.”  
21 *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 167 (Cal. 1976) (citation omitted). That is precisely  
22 the case here.

23 The Ordinance directs the City Manager to “implement the requirements and fulfill the  
24 policies of [the Ordinance] relating to the reduction of gun harm,” including by designating the  
25 nonprofit receiving the Fee and setting forth “processes and procedures relating to the payment of  
26 the fee, and any additional guidelines or auditing of the use of the monies from the fee.” §  
27 10.32.235 (A), *et seq.* The nonprofit clearly has more than vague directions from the City. ¶¶ 77,  
28 143. Simply because the City “shall not specifically direct how” the designated nonprofit will



1 expend the fee, that does not “violate the City Charter’s delegation of executive functions to the  
 2 administrative branch of the City Government.” *Id.* San Jose maintains authority over how the  
 3 designated nonprofit expends the fee through the administrative oversight of the City Manager. (§  
 4 10.32.235). But “[n]either Council nor any of its members nor the Mayor shall interfere with the  
 5 execution by the City Manager of [their] powers and duties.” Charter § 411. Therefore, authority  
 6 over expenditure of the Fee is properly vested and Plaintiffs claim the City is violating its own  
 7 charter are false.

#### 8 **6. Plaintiffs Fail to State a Claim for Declaratory Relief.**

9 Plaintiffs’ make a claim for declaratory relief “to the extent that each of the claims above  
 10 have not already established a remedy.” ¶ 148. This claim should be dismissed as impermissibly  
 11 duplicative of Plaintiffs’ other five claims, and because it fails for all the same reasons as those set  
 12 forth above.

#### 13 **C. THE FAC SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND.**

14 Defendants respectfully request that the FAC be dismissed without leave to amend, in light  
 15 of futility, and serious federalism concerns. Preliminarily, the Ninth Circuit’s permissive standards  
 16 for granting leave to amend do not apply here. Rule 15(a) only allows parties to amend pleadings  
 17 to “assert matters that were overlooked or were unknown *at the time the party interposed the*  
 18 *original complaint.*” 6 Wright & Miller, FED. PRAC. & PROC. § 1473 (3d ed. 2021). Both Plaintiffs’  
 19 original complaint and FAC were filed before the Ordinance was effective. No amount of  
 20 amending could teleport the FAC “to the future,” to a time when the Ordinance is effective. And  
 21 allowing Plaintiffs to supplement their pleadings under Rule 15(d) would also not be permissible.  
 22 “If jurisdiction is lacking at the outset [of a litigation], the district court has no power to do  
 23 anything with the case except dismiss.” *Morongo Band of Mission Indians v. Cal. State Bd. of*  
 24 *Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Lopez v.*  
 25 *Turnage*, 2021 WL 5142070, at \*1 (N.D. Cal. Oct. 15, 2021). Moreover, the Ordinance is what it  
 26 is. The legal defects described in this Motion cannot be cured by adding different factual  
 27 allegations to the FAC. “Any amendment would be futile.” *Leadsinger, Inc. v. BMG Music Pub.*,  
 28 512 F.3d 522, 532 (9th Cir. 2008).

1 A practice of allowing plaintiffs to sue legislators before a bill is effective so that the  
 2 plaintiffs could amend or supplement their pleadings when the bill becomes effective is  
 3 inappropriate. *Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *Portland Police Ass'n v. City of*  
 4 *Portland*, 658 F.2d 1272, 1275 n.3 (9th Cir. 1981) (citing “federalism concerns” as reason for  
 5 declining to exercise jurisdiction in litigation involving municipal police department policies);  
 6 *Westlands Water Distrib. Dist. v. Nat. Res. Defense Council*, 276 F.Supp.2d 1046, 1051 (E.D. Cal.  
 7 2003). The Court should dismiss the FAC with prejudice.

8 **V. CONCLUSION**

9 For the foregoing reasons, the City respectfully requests that the Court dismiss the FAC  
 10 under Rules 12(b)(1) and 12(b)(6). Since the FAC’s defects cannot be cured, Plaintiffs respectfully  
 11 request the dismissal be without leave to amend.

12  
 13 Dated: April 8, 2022

**COTCHETT, PITRE & McCARTHY, LLP**

14  
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**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

**NATIONAL ASSOCIATION FOR GUN  
RIGHTS, INC.**, a nonprofit corporation, and  
**MARK SIKES**, an individual,

Plaintiffs,

v.

**CITY OF SAN JOSE, a public entity,**  
**JENNIFER MAGUIRE**, in her official capacity  
as City Manager of the City of San Jose, and the  
**CITY OF SAN JOSE CITY COUNCIL**,

Defendants.

Case Number: 5:22-cv-00501-BLF

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR PRELIMINARY  
INJUNCTION AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Hearing Date: July 21, 2022  
Hearing Time: 9:00 a.m.  
Location: Courtroom 3, 5<sup>th</sup> Floor  
Robert F. Peckham Federal Building  
280 South First Street, San Jose, CA

Judge: Honorable Beth Labson Freeman



Plaintiffs' Notice of Motion and Motion for  
Preliminary Injunction

No: 22-cv-00501-BLF

**TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on July 21, 2022, at 9:00 a.m. or as soon thereafter this matter may be heard before the Honorable Beth Labson Freeman, in Courtroom 3 of the above-entitled Court, located at the Robert F. Peckham Federal Building & United States Courthouse, 280 South 1st Street, Room 2112, San Jose, California, 95113.

Plaintiffs National Association for Gun Rights, Inc. ("NAGR") and Mark Sikes ("Sikes"), pursuant to Fed. R. Civ. P. 65, will and hereby do move this Court for the issuance of a preliminary injunction prohibiting Defendants from enforcing Part 6 of Chapter 10.32 of Title 10 (§§10.32.200-10.32.250) of the City of San Jose's local ordinances.

The grant of a preliminary injunction is warranted because: (i) to allow the Ordinance to go into effect would deprive Plaintiffs, as well as all citizens of San Jose, of their First, Second, Fifth, and Fourteenth Amendment rights under the United States Constitution, articles XI and XIII of the California Constitution, and the San Jose Charter, (ii) the denial of such relief would irreparably harm Plaintiffs, (iii) providing said relief would not harm Defendants; and (iv) the public interest favors upholding the United States and California Constitutions and the San Jose City Charter, and (v) Plaintiffs are likely to succeed on the merits.

In support of this Motion, Plaintiffs respectfully refer this Court to this Motion, the Memorandum of Points and Authorities in Support of the Motion for Preliminary Injunction, the attached exhibits, the pleadings on record, and the arguments of counsel.

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2 Date: March 8, 2022

Respectfully submitted,

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
	RELEVANT FACTUAL BACKGROUND.....	2
	The Ordinance.....	4
	The Purpose and Justifications of the Ordinance.....	4
	ARGUMENT .....	9
I.	PLAINTIFFS ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF. ....	9
A.	There Is a Strong Likelihood Plaintiffs’ Will Succeed in Proving Their Claims on Multiple Grounds.....	9
1.	The Ordinance violates the Second Amendment of the United States Constitution.....	9
	<i>a. The Ordinance Burdens The Right to Keep Arms.....</i>	11
	<i>b.The Court Should Apply Strict Scrutiny.....</i>	11
	<i>c.The Ordinance Even Fails Intermediate Scrutiny.....</i>	13
	<i>d. Alternatively, the Ordinance is Unconstitutional Because It Burdens the Second Amendment Right to Keep and Bear Arms .....</i>	13
2.	The Ordinance Violates Plaintiffs’ Free Speech and Association Rights.....	15
3.	The Ordinance Violates article XI, § 7 of the California Constitution. ....	18
4.	The Orders Violate Article XIII C, Section 1 of the California Constitution..	19
5.	The Ordinance Violates the San Jose’s City Charter’s Reservation of Budget and Appropriation Powers to the City Council and Administrative Powers to the City Manager.....	20
6.	The Ordinance Violates the San Jose City Charter’s Requirement that City Receipts Be Deposited into City Accounts.....	21
B.	Plaintiffs Face Imminent Irreparable Harm Absent Immediate Injunctive Relief.	21
C.	The Balance of Hardships Tips Decidedly in Plaintiffs’ Favor.....	22
D.	Injunctive Relief Is In The Public Interest.....	22
II.	THE COURT SHOULD DISPENSE WITH ANY BOND REQUIREMENT .....	23

1 CONCLUSION .....23

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>All for Wild Rockies v. Cottrell</i> ,	
632 F.3d 1127 (9th Cir. 2011). ....	8
<i>Americans for Prosperity Foundation v. Harris</i> ,	
182 F. Supp. 3d 1049 (C.D. Cal. 2016). ....	21
<i>Bauer v. Becerra</i> ,	
858 F.3d 1216 (9th Cir. 2017) .....	14
<i>Bible Club v. Placentia-Yorba Linda School Dist.</i> ,	
573 F. Supp. 2d 1291 (C.D. Cal. 2008). ....	22
<i>College Republicans at San Francisco State University v. Reed</i> ,	
523 F. Supp. 2d 1005 (N.D. Cal. 2007) .....	20
<i>Community House, Inc. v. City of Boise</i> ,	
490 F.3d 1041 (9th Cir. 2007) .....	21
<i>Cox v. New Hampshire</i> ,	
312 U.S. 569 (1941).....	13, 14
<i>District of Columbia v. Heller</i> ,	
554 U.S. 570 (2008).....	passim
<i>Doctor John's, Inc. v. Sioux City</i> ,	
305 F. Supp. 2d 1022 (N.D. Iowa 2004).....	22
<i>Doe v. Harris</i> ,	
772 F.3d 563 (9th Cir.2014) .....	21, 22
<i>Duncan v. Becerra</i> ,	
265 F.Supp.3d 1106 (S.D. Cal. 2017).....	21, 22
<i>Elrod v. Burns</i> ,	
427 U.S. 347 (1976).....	20
<i>Ezell v. City of Chicago</i> ,	
651 F.3d 684 (7th Cir. 2011) .....	10, 11, 20



1	<i>Fiscal v. City and County of San Francisco,</i>	
2	158 Cal.App.4th 895 (Cal. Ct. App. 2008).....	17
3	<i>Janus v. AFSCME, Council 31,</i>	
4	138 S.Ct. 2448 (2018).....	15, 16
5	<i>Jorgensen v. Cassidy,</i>	
6	320 F.3d 906 (9th Cir. 2003). ....	22
7	<i>Keller v. State Bar of California,</i>	
8	496 U.S. 1 (1990).....	15
9	<i>Knox v. SEIU,</i>	
10	567 U.S. 298 (2012).....	15
11	<i>Kwong v. Bloomberg,</i>	
12	723 F.3d 160 (2nd Cir. 2013).....	14
13	<i>McDonald v. City of Chicago, Ill.,</i>	
14	561 U.S. 742 (2010).....	9
15	<i>Minneapolis Star and Tribune Co. v. Minnesota Comm’r. of Rev.,</i>	
16	460 U.S. 575 (1983).....	10
17	<i>Murdock v. Com. of Pennsylvania,</i>	
18	319 U.S. 105, 112 (1943).....	1, 9, 13, 14
19	<i>Nordyke v. King,</i>	
20	681 F.3d 1041 (9th Cir. 2012) ....	9
21	<i>Pimentel v. Dreyfus,</i>	
22	670 F.3d 1096 (9th Cir. 2012) ....	8
23	<i>Regan v. Taxation with Representation of Wash.,</i>	
24	461 U.S. 540 (1983).....	16
25	<i>S.O.C., Inc. v. Cnty. of Clark,</i>	
26	152 F.3d 1136 (9th Cir. 1998). ....	20
27	<i>Sammartano v. First Jud. Dist. Ct.,</i>	
28	303 F.3d 959 (9th Cir. 2002). ....	20, 21, 22

1	<i>Stormans, Inc. v. Selecky</i> ,	
2	586 F.3d 1109 (9th Cir. 2009). ....	21
3	<i>United States v. Chester</i> ,	
4	628 F.3d 673 (4th Cir. 2010) .....	11
5	<i>United States v. Chovan</i> ,	
6	735 F.3d 1127 (9th Cir. 2013) .....	9, 10, 11, 12
7	<i>United States v. Masciandaro</i> ,	
8	638 F.3d 458 (4th Cir. 2011) .....	9
9	<i>Winter v. Natural Res. Def. Council, Inc.</i> ,	
10	555 U.S. 7 (2008).....	8
11	<i>Wooley v. Maynard</i> ,	
12	430 U.S. 705 (1977).....	16
13		
14	<b>STATUTES</b>	
15	42 U.S.C. § 1983.....	8
16	Cal. Penal Code § 12026.....	17
17	Cal. Penal Code § 23500.....	17
18	Cal. Penal Code § 23520.....	17
19	Cal. Penal Code § 25225.....	17
20	Cal. Penal Code § 25850.....	4
21	Cal. Penal Code § 26150.....	4
22	Cal. Penal Code § 26155.....	4
23	Cal. Penal Code § 26350.....	4
24	Cal. Penal Code § 26400.....	4
25	Cal. Penal Code § 28070.....	17
26	Cal. Penal Code § 29010.....	17
27	Cal. Penal Code § 29184.....	17
28	Cal. Penal Code § 29610.....	17

v

Plaintiffs' Notice of Motion and Motion for  
Preliminary Injunction

Case No.22-cv-00501-BLF

1	Cal. Penal Code § 30165.....	17
2	Cal. Penal Code § 30900.....	17
3	Cal. Penal Code § 34370.....	17
4		
5	Title 10 of the San José Municipal Code:	
6	§ 10.32.200.....	12
7	§ 10.32.200.A.....	4
8	§ 10.32.200.B.2.....	4
9	§ 10.32.200.B.4.....	4
10	§ 10.32.200.B.7.....	4
11	§ 10.32.200.B.8.....	5, 13
12	§ 10.32.200.B.9.....	5, 13
13	§ 10.32.200.B.12.....	5
14	§ 10.32.205.....	7
15	§ 10.32.210.....	4
16	§ 10.32.210.A.....	6
17	§ 10.32.215.....	passim
18	§ 10.32.220.....	7, 14
19	§ 10.32.220.A.....	7
20	§ 10.32.220.C.....	7, 19
21	§10.32.225.....	4, 10
22	§ 10.32.230.A.....	6
23	§ 10.32.240.....	4, 6, 8
24	§10.32.245.....	4, 6, 8
25	§10.32.250.....	4, 8, 14
26	San Jose City Charter:	
27	§ 400.....	19
28	§ 1204.....	19

1 § 1206..... 19

2 § 1211..... 20

3 **RULES**

4  
5 Fed. R. Civ. P. 65(c) ..... 22

6  
7 **CONSTITUTIONAL AUTHORITIES:**

8 California Consitution:

9 Article XI, section 7 ..... 17, 18

10 Article XIII C, §2(b) ..... 18

11 Article XIII C, §1 ..... 18

12 Article XIII C, §1(e) ..... 18

13 Article XIII C, §2(d) ..... 18

14  
15 United States Consitution:

16 amend. I..... passim

17 amend. II ..... passim

18 amend. XIV ..... 1

19 **OTHER AUTHORITIES**

20 A Bill for Establishing Religious Freedom, in 2 papers of Thomas Jefferson 545 (J. Boyd ed. 1950)

21 ..... 151

22 Lauren Hernández, *Gun Owners In San Jose Must Buy Liability Insurance Under Newly Passed*

23 *First-In-The-Nation Law*, SAN FRANCISCO CHRONICLE, Jan. 25, 2022 (updated Jan. 26, 2022) ..... 3

24 Liccardo Press Release, Jan. 19, 2022 ..... 4, 5, 6, 13

25 Liccardo Press Release, Jan. 25, 2022 ..... 2, 3

26 Olga R. Rodriguez and Juliet Williams, *San Jose Approves First Law In U.S. Requiring Gun Owners*

27 *To Have Insurance*, LOS ANGELES TIMES, Jan. 25, 2022 ..... 3

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 “The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.”

4 *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 63 S. Ct. 870, 874, 87 L. Ed. 1292 (1943).

5  
6 The Supreme Court has made it clear that laws designed to burden the exercise of the  
7 fundamental right to own a gun and keep it in one’s own home is unconstitutional. Just as taxing  
8 the press for the right to circulate its content is unconstitutional, so too is an annual tax on the  
9 right to own a gun. Yet, the City of San Jose (“City”) has taken the unprecedented step of  
10 requiring virtually all gun owners who reside in the City to pay annual fees just for their right to  
11 own a gun and to pay for special insurance, or risk forfeiture of their guns.

12 The amount of the fees and the cost of the insurance are not defined by this new law and  
13 are subject to the whims of the San Jose City Council and private insurance companies—who may  
14 not even offer the policy that the City demands to avoid nullification of a person’s Second  
15 Amendment rights. To make matters worse, one of the fees comprises a compulsory donation to a  
16 government-chosen nonprofit, forcing gun owners to associate with a group against their will and  
17 to fund educational programs targeting themselves that they didn’t ask for and may not want,  
18 need, or agree with.

19 This new law does not just violate the United States Constitution. It also violates the  
20 California Constitution and the City’s own Charter. The California Constitution prevents local  
21 governments from enacting laws when state law already occupies the field and California already  
22 has extensive gun regulations thoroughly occupying this field. Additionally, the insurance  
23 requirement and the Gun Harm Reduction Fee are taxes within the meaning of the law and the  
24 City failed, as required by the California Constitution, to submit them to the electorate for  
25 approval. Finally, by forcing gun owners to pay the City’s Gun Harm Reduction Fee directly to a  
26 third party nonprofit to spend as it chooses outside of the control of the City Council, the City’s  
27 new gun ordinance violates provisions of its own Charter by unlawfully delegating the City  
28 Council’s budgetary and appropriation powers and by not depositing all of the Ordinance’s

proceeds into the City's general fund.

Accordingly, this Court should immediately issue a preliminary injunction to prevent the City from enforcing the unconstitutional and unlawful Ordinance.

#### RELEVANT FACTUAL BACKGROUND

On June 29, 2021, the City Council directed San Jose City Attorney Nora Frimann "to return to Council with an ordinance for Council consideration that would require every gun owner residing in the City of San José, with certain exceptions, to obtain and maintain a City-issued document evincing payment of an annual fee, and attestation of insurance coverage for unintentional firearm-related death, injury, or property damage." Frimann Mem. re Gun Harm Reduction Ord., Jan. 14, 2022, ("City Attorney Mem.") (attached hereto as Exhibit A). Plaintiff National Association for Gun Rights immediately sent the City a cease and desist letter warning that the proposed ordinance was unconstitutional. *See* Ltr. From D. Warrington and H. Dhillon to San Jose City Council, July 14, 2021 (attached hereto as Exhibit B).

On January 14, 2022, in advance of the City Council's January 25 meeting, the San Jose City Attorney issued a memorandum in compliance with the City Council's directions that recommended the Council "[c]onsider approving an ordinance amending Title 10 of the San José Municipal Code to add Part 6 to Chapter 10.32 to reduce gun harm by: (a) requiring gun owners to obtain and maintain liability insurance; and (b) authorizing a fee to apply to gun harm reduction programs." City Attorney Mem. at 1(Ex. A). Under a section addressing penalties for noncompliance, the City Attorney stated that "[f]ailure to comply shall constitute a civil violation subjecting the owner to the temporary or permanent seizure of the gun, and under specified circumstances, a fine." *Id.* at 2.

In an op-ed published on January 19, 2021, in the Los Angeles Times, San Jose Mayor Sam Liccardo wrote "[l]ast June our City Council unanimously approved my proposals that will mitigate gun harm in our community — and a final vote on Jan. 25 should turn them into law." Mayor Sam Liccardo, *Op-Ed: My City's New Gun Control Laws Will Help More Than Waiting On Congress To Do Something*, LOS ANGELES TIMES, Jan. 19, 2022), <https://www.latimes.com/opinion/story/2022-01-19/op-ed-new-gun-control-laws-help-congress> (attached as Exhibit C).

//

1 On January 21, 2022, Mayor Liccardo, Vice Mayor Jones, Councilmember Cohen, and  
 2 Councilmember Carrasco issued “Directions” to the City Council, including to “[a]pprove the  
 3 proposed ordinance,” with certain modifications. Mayor’s Mem. to City Council, Jan. 21, 2022, 2  
 4 (attached as Exhibit D). The Mayor’s Memorandum also noted that “Members of the California  
 5 legislature are exploring bills to have law enforcement agencies *seize guns as a sanction for*  
 6 *violations of local gun regulations*, with subsequent restoration of ownership as required by  
 7 constitutional due process.” *Id.* at 4 (emphasis added).

8 Following the City Council’s January 25, 2022, meeting, the Mayor immediately issued a  
 9 press release the night of the vote, in which he boasted that “Tonight San José became the first city  
 10 in the United States to *enact* an ordinance to require gun owners to purchase liability insurance, and  
 11 to invest funds generated from fees paid by gun owners into evidence-based initiatives to reduce gun  
 12 violence and gun harm.” Liccardo Press Release, Jan. 25, 2022 (emphasis added) (attached as  
 13 Exhibit E).

14 Within 24 hours, articles were published about San Jose enacting an unprecedented  
 15 regulation of gun ownership, including the San Francisco Chronicle and the Los Angeles Times. *See*  
 16 Lauren Hernández, *Gun Owners In San Jose Must Buy Liability Insurance Under Newly Passed*  
 17 *First-In-The-Nation Law*, SAN FRANCISCO CHRONICLE, Jan. 25, 2022 (updated Jan. 26, 2022),  
 18 [https://www.sfchronicle.com/bayarea/article/Gun-owners-in-San-Jose-must-buy-liability-](https://www.sfchronicle.com/bayarea/article/Gun-owners-in-San-Jose-must-buy-liability-16804951.php)  
 19 [16804951.php](https://www.sfchronicle.com/bayarea/article/Gun-owners-in-San-Jose-must-buy-liability-16804951.php) (“The San Jose City Council adopted a measure Tuesday night requiring gun owners  
 20 in the South Bay city to buy liability insurance for their firearms, city officials said.”)(attached as  
 21 Exhibit F); Olga R. Rodriguez and Juliet Williams, *San Jose Approves First Law In U.S. Requiring*  
 22 *Gun Owners To Have Insurance*, LOS ANGELES TIMES, Jan. 25, 2022,  
 23 <https://www.latimes.com/california/story/2022-01-25/san-jose-gun-liability-insurance> (attached as  
 24 Exhibit G)(“The city of San Jose voted Tuesday night to require gun owners to carry liability  
 25 insurance in what’s believed to be the first measure of its kind in the United States. The San Jose  
 26 City Council overwhelmingly approved the measure despite opposition from some gun owners who  
 27 said it would violate their 2nd Amendment rights.”).

28 The Ordinance was placed on the consent calendar for the City Council’s February 8, 2022,

1 meeting, during which a majority of the City Council voted again to approve the Ordinance. Def.'s  
2 Mem. Supp. Mot. Dismiss 3.

### 3 **The Ordinance**

4 The Ordinance will take effect on August 8, 2022, one hundred eighty days from the date  
5 of its adoption on February 8, 2022, Ord., Sec. 2, and will be codified as Chapter 10.32 of Title  
6 10 of the San Jose Municipal Code, Ordinance section 1-2. Ordinance (attached as Exhibit H). It  
7 will require 50,000-55,000 San Jose residents, minus a few exceptions, to keep proof with their  
8 guns that they have an insurance policy for gun accident liability and have paid an annual Gun  
9 Harm Reduction Fee to a nonprofit chosen by the City Manager. *Id.*, §§ 10.32.210, 10.32.215,  
10 10.32.250; Liccardo Mem. Re Gun Harm Reduction Ord., Jan. 19, 2022 (attached as Exhibit I).  
11 The penalties for noncompliance include “impoundment” (seizure) of a person’s guns and the  
12 payment of fines. Ordinance §§ 10.32.240, 10.32.245.

13 This Ordinance targets gun ownership in the home because it does not apply to those who  
14 have a license to carry a concealed weapon. Ordinance §10.32.225. (Without a concealed carry  
15 permit, there is virtually no other way San Jose residents can exercise their Second Amendment  
16 rights outside of the home. *See* CAL. PENAL CODE §§ 25850, 26150, 26155, 26350, 26400.)

### 17 **The Purpose and Justifications of the Ordinance**

18 The City’s vague purpose for the Ordinance is “to reduce gun harm.” Ordinance  
19 § 10.32.200.A. The Ordinance cites overall state and national injury data for homicide, suicide, and  
20 accidents, and statistics on the total number of youth injured in California in certain years. Ordinance  
21 § 10.32.200.B.2. As to “gun harm” in San Jose, specifically, the Ordinance notes that in *Santa Clara*  
22 *County*, in which San Jose is located, “sixteen (16%) of hospitalizations from firearms injuries were  
23 due to unintentional shootings.” Ordinance § 10.32.200.B.4. The nonprofit organization helping the  
24 City enact and justify the Ordinance, Pacific Institute for Research and Evaluation (PIRE), concluded  
25 in its own analysis that an average of “206 people suffer death or serious bodily injury from gunshots  
26 each year” in San Jose, though the Ordinance does not specify how many were typically due to  
27 accidents or suicide, or intentional violence. *See* Ordinance § 10.32.200.B.7.

28 The Ordinance contains an estimation that “San Jose taxpayers annually spend approximately



1 \$39.7 million, or approximately \$151 per firearm-owning household, to respond to gun violence with  
 2 such public services as emergency police and medical response, victim assistance, incident  
 3 investigation, acute and long-term care, and perpetrator adjudication and judicial sanctioning.”  
 4 Ordinance § 10.32.200.B.8. This estimation also does not differentiate between the costs arising due  
 5 to intentional violence, suicide, and accidents.

6 The Ordinance boldly claims that “including private costs to individuals and families...San  
 7 Jose residents incur an annual financial burden of \$442 million per year.” *Id.*, § 10.32.200.B.9.  
 8 However, more than \$328,355,500 or 74% of these alleged costs are for the impact of guns on  
 9 “quality of life,” which includes the “value of pain, suffering, and lost quality of life.” Liccardo Jan.  
 10 19, 2022, Memo., 4 (Ex. I). The next highest figure within the asserted \$442 million calculation is  
 11 “lost work,” accounting for \$78,272,000 or nearly 18% of the total. *Id.* In other words, 92% of the  
 12 \$442 million in “costs” claimed in the Ordinance comprises artificially calculated “quality of life”  
 13 and “lost work” due to all causes of firearm deaths and injuries.

14 Accordingly, the costs used to calculate the total financial burden on San Jose, which the  
 15 Ordinance aims to fully or partially recoup from all gun owners, does not correct for the  
 16 overwhelming costs imposed by the perpetrators of violent criminal conduct that the Ordinance does  
 17 not target, and 92% of the highest dollar figure the Ordinance cites for support does not comprise  
 18 actual expenses incurred by the City. And yet, the Ordinance uses these sham figures to justify:

19 (A) imposing a collective financial burden on all gun owners (except those with a permit to  
 20 carry their guns) through the Gun Harm Reduction Fee;

21 (B) compelling gun owners to pay the Gun Harm Reduction Fee directly to a City-chosen  
 22 nonprofit, a forced donation, allegedly for programs to re-educate gun owners about the dangers of  
 23 guns *and other purposes*; and

24 (C) requiring all gun owners to buy insurance to cover the costs to victims of the accidental  
 25 use of guns (but not all crime victims).

26 As to compelling purchase of insurance, the Ordinance provides no studies or statistics  
 27 establishing that gun liability insurance will reduce gun violence. Instead, the Ordinance includes  
 28 only the conclusory statement that “Liability insurance can reduce the number of gun incidents by

1 encouraging safer behavior....” Ordinance § 10.32.200.B.12.

2 Thus, every citizen of San Jose will be forced to pay a fee and buy insurance to exercise their  
3 fundamental Constitutional right to home and self-defense by owning a gun based on the direct and  
4 societal costs primarily caused by criminals using guns illegally. Liccardo Jan. 19, 2022, Memo. 1  
5 (Ex. I) (noting that “Assaults and homicides are most common” and “Unintentional gunshot wounds  
6 tend to be less serious.”). Specifically, according to PIRE, the alleged costs to the City of homicide  
7 and assault are \$7,067,303 out of \$7,940,358 (or 89%) of the total costs, *id.* at 2, and PIRE also  
8 attributed the majority of its artificially calculated societal costs of guns to “Homicide/Assault/Legal  
9 Intervention.” *Id.* at 5 (\$253,828,000 out of \$441,699,000).

10 *a. The Insurance Mandate*

11 The insurance mandate requires that “A person who resides in the City of San Jose and owns  
12 or possesses a Firearm in the City shall obtain and continuously maintain in full force and effect a  
13 homeowner’s, renter’s or gun liability insurance policy...specifically covering losses or damages  
14 resulting from any accidental use of the Firearm, including but not limited to, death, injury, or  
15 property damage.” Ordinance § 10.32.210.A. The Ordinance does not include any information about  
16 minimum insurance coverage thresholds or premiums. *See generally* Ordinance. Thus, the insurance  
17 requirement lacks certainty as to the cost of insurance, what has to be covered, and minimum  
18 coverage thresholds. This guesswork will allow private for-profit corporations to dictate the  
19 government mandated cost of owning a gun. Additionally, based on the insurance companies’  
20 economic interests, they may choose not to insure a person who nonetheless has a Constitutional  
21 right to keep and bear arms.

22 To comply with the Ordinance, gun owners must present a “City-designated attestation form”  
23 signed under penalty of perjury identifying their insurance policy to any police officer who “knows  
24 or *has reason to believe*” they possess a firearm. Ordinance § 10.32.230.A (emphasis added).  
25 Failure to comply with the Ordinance authorizes seizure (“impoundment”) of the person’s gun and  
26 fines. Ordinance §§ 10.32.240; 10.32.245.

27 *b. Gun Harm Reduction Fee*

28 The first of two fees the Ordinance imposes requires that “A person who resides in the City

1 and owns or possesses a Firearm in the City shall pay an Annual Gun Harm Reduction Fee to the  
 2 Designated Nonprofit Organization each year.” Ordinance § 10.32.215. The fee amount is not  
 3 specified in the Ordinance, which neither contains any criteria to determine what the fee will be nor  
 4 any limits on how high it can be set. *See id.* Rather, the City Council reserved the right for itself to  
 5 determine this amount at an unspecified later date. *Id.*

6 The Ordinance requires gun owners to pay this fee directly to a nonprofit chosen by the City  
 7 Manager, Defendant Jennifer Maguire (“Maguire”). *Id.*, §§ 10.32.205; 10.32.220. No part of the  
 8 City’s fee actually goes to the City. Further, “all monies...shall be expended by the Designated  
 9 Nonprofit Organization.” *Id.*, § 10.32.220.A. Additionally, once the money is in the nonprofit’s  
 10 coffers, “the City shall not specifically direct how the monies from the Gun Harm Reduction Fee are  
 11 expended.” *Id.*, §10.32.220.C. Accordingly, without City oversight or even knowledge of the fees  
 12 being paid to the nonprofit, and with the City prohibiting itself from controlling how the funds are  
 13 being spent, the potential for waste, fraud, and abuse is staggering. As discussed below, it is also  
 14 illegal.

15 The Ordinance provides scant information about the Designated Nonprofit Organization,  
 16 other than the fact that it will have a contract with the City. In recent public comments, Mayor  
 17 Liccardo has claimed that, in addition to funding this nonprofit, the City will also be creating it and  
 18 choosing its members—but this is not stated anywhere in the Ordinance. Mary Harris, *San Jose’s*  
 19 *New Gun Law Is the First of Its Kind*, Slate.com (Feb. 3, 2022), [https://slate.com/news-and-](https://slate.com/news-and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html)  
 20 [politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html](https://slate.com/news-and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html) (attached as Exhibit  
 21 J)(“We’re forming a 501(c)(3) foundation, which is going to receive the dollars, and the board,  
 22 which will be comprised of a host of folks, . . .”).

23 The only criteria for the City’s contract with the nonprofit as to how the funds are ultimately  
 24 spent is that the nonprofit’s services are to “include, but are not necessarily limited to” suicide  
 25 prevention services or programs, violence reduction or domestic violence services or programs,  
 26 addiction intervention and substance abuse treatment, mental health services related to gun violence,  
 27 and firearms safety education or training. *Id.*, § 10.32.220.A. “All monies from the Gun Harm  
 28 Reduction Fee shall be expended by the Designated Nonprofit Organization” to provide the services

1 and programs listed above exclusively to “residents of the city that own or possess a Firearm in the  
2 City, to members of their household, or to those with whom they have a close familial or intimate  
3 relationship.” *Id.*

4 The fee thus functions as a way to compel gun owners to give their money to a government  
5 approved nonprofit, that will inevitably hold the City’s anti-gun biases, to spend on unspecified  
6 programs targeting gun owners at the nonprofit’s sole discretion with little to no City oversight. The  
7 program forces gun owners to subsidize an organization that is hostile to gun ownership, to be used  
8 for their own re-education. But although the Gun Harm Reduction Fee must be exclusively spent on  
9 programs to re-educate gun owners, members of their household, or to those with whom they have a  
10 close familial or intimate relationship, *id.*, the Ordinance in fact does not include *any* requirement for  
11 gun owners or anyone else to attend the nonprofit’s programs.

12 Despite justifying the Ordinance on the grounds that gun injuries are allegedly costing the  
13 City hundreds of millions of dollars, the Gun Harm Reduction Fee does not compensate the city for  
14 any of those alleged losses. The Ordinance authorizes the City Manager to collect *another*  
15 undetermined fee to administer the Ordinance, that is, to “charge and collect any and all cost  
16 recovery fees associated with fulfilling the policies of this Part relating to the reduction of gun harm,  
17 including any associated third-party costs.” Ordinance § 10.32.250.

18 Any gun owner who does not pay the Gun Harm Reduction Fee could be issued an as yet  
19 undetermined fine, Ordinance § 10.32.240 (it “shall be set forth in the schedule of fines established  
20 by resolution of the City Council”) and may have their gun “impounded.” *Id.* at §10.32.245.  
21 In a recent interview, the Mayor disclosed how the Ordinance could allow the police new  
22 opportunities to confiscate guns.

23  
24 Encountering people with guns, out on the street, in bars and nightclubs—you can  
25 imagine a host of different venues where a police officer would really like to have the  
26 ability to remove a gun from a potentially combustible situation. For example, there’s  
27 a bar brawl and they’re patting down everybody and someone’s got a gun. “Have you  
28 paid your fee? You have insurance?” “No.” OK, well, there’s an opportunity for us to  
remove the gun.

*San Jose’s New Gun Law Is the First of Its Kind, Supra.* (Ex. J).

\* \* \* \*

The insurance requirement and both of the fees in the Ordinance are unknown costs imposed on gun owners that are designed to deter gun ownership. These unknown costs are subject to the whims of the City Council and insurance companies and bear a significant risk of making gun ownership cost prohibitive. The unknown extent of the costs further, whatever they may be now or in the future, chills the exercise of Second Amendment rights.

Plaintiffs therefore seek a preliminary injunction to prevent the City from enforcing the Ordinance, which it will do should this Court not take action prior to August 8, 2022.

### ARGUMENT

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008); *see Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (applying *Winter* to claim under 42 U.S.C. § 1983); *All for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

#### **I. PLAINTIFFS ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF.**

##### **A. There Is a Strong Likelihood Plaintiffs’ Will Succeed in Proving Their Claims on Multiple Grounds.**

##### **1. The Ordinance violates the Second Amendment of the United States Constitution.**

Defendants’ Ordinance violates the Second Amendment to the U.S. Constitution, which prohibits the government from infringing “the right of the people to keep and bear Arms.” U.S. Const., amend. II. The Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Even in the face of “the problem of handgun violence in this country...the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Id.* at 636. “[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago, Ill.*,

1 561 U.S. 742, 778 (2010). “The upshot of [*Heller* and *McDonald*] is that there now exists a clearly-  
 2 defined fundamental right to possess firearms for self-defense within the home.” *United States v.*  
 3 *Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011). Local governments, including the City of San Jose,  
 4 are bound by the Second Amendment. *McDonald*, 561 U.S. at 790; *Nordyke v. King*, 681 F.3d 1041,  
 5 1044 (9th Cir. 2012).

6 In Second Amendment challenges, the Ninth Circuit, along with other circuits have “looked  
 7 to the First Amendment as a guide.” *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013).  
 8 In *Murdock v. Pennsylvania*, the Supreme Court considered a payment for a license to solicit or  
 9 deliver orders for goods, as applied to the evangelizing activity of Jehovah’s Witnesses. 319 U.S.  
 10 105, 106 (1943). The court thus examined the constitutionality of a requirement to, as it called it,  
 11 “pay a license *tax* as a condition to the pursuit of their activities” that were protected by the First  
 12 Amendment. *Murdock*, 319 U.S. at 110 (emphasis added).

13 Similarly, the Ordinance’s requirement that gun owners pay a Gun Harm Reduction Fee and  
 14 purchase insurance comprise taxes as a condition for the ownership of a gun, a constitutional right.  
 15 “This tax is not a charge for the enjoyment of a privilege or benefit *bestowed by the state*,” but rather  
 16 “[t]he privilege in question *exists apart from state authority*” because “[i]t is guaranteed [to] the  
 17 people by the federal constitution.” *Murdock*, 319 U.S. at 115 (emphasis added).

18 Under the California Constitution, too, the Gun Harm Reduction Fee and the Insurance  
 19 Mandate are deemed taxes. A “‘tax’ means any levy, charge, or exaction of any kind imposed by a  
 20 local government,” with the exception of seven kinds of charges not relevant here. Cal. Const. Art. X  
 21 III C §1 (e).

22 Courts have historically rejected taxing First Amendment rights and therefore Second  
 23 Amendment rights cannot be taxed. “A tax that burdens rights protected by the [Constitution] cannot  
 24 stand unless the burden is necessary to achieve an overriding government interest.” *Minneapolis Star*  
 25 *and Tribune Co. v. Minnesota Comm’r. of Rev.*, 460 U.S. 575, 582 (1983). Taxing the press’s  
 26 circulation of content “suggests that the goal of the regulation is not unrelated to the suppression of  
 27 expression.” *Id.* at 585. The same is true for the taxation of guns. It is a thinly veiled attempt at  
 28 suppressing the exercise of the right to keep and bear arms by making it more costly and

1 burdensome to own a gun—in addition to compelling the subsidization of anti-gun education  
2 programs.

3 Courts evaluate Second Amendment challenges by using a two-step inquiry. First, a court  
4 asks “whether the challenged law burdens conduct protected by the Second Amendment.” *Chovan*,  
5 735 F.3d at 1136. This step evaluates “a textual and historical inquiry into original meaning.” *Ezell*  
6 *v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (citing *Heller*, 554 U.S. at 634-35; *see also*  
7 *Chovan*, 735 F.3d at 1137). This first step has a low bar. Even a prohibition on “domestic violence  
8 misdemeanants” from possessing firearms satisfied the first step of the test. *Chovan*, 735 F.3d at  
9 1137.

10 *a. The Ordinance Burdens the Right to Keep and Bear Arms*

11 Regulations on guns in the home fall squarely into the Second Amendment’s protections.  
12 Indeed, it is at home “where the need for defense of self, family, and property is most acute.” *Heller*,  
13 554 U.S. at 628. The Ordinance’s primary, if not sole, aim is at guns possessed within the home, as  
14 evidenced by it only applying to citizens who cannot carry a weapon outside the home. Ordinance  
15 §10.32.225.

16 Further, Mayor Liccardo’s January 21, 2022, Memo states that the insurance mandate will  
17 encourage “use of gun safes [and] install child-safe trigger locks,” which address storage in the  
18 home, and noted that “4.6 million children live in a *household* where a gun is kept and unlocked and  
19 loaded, and 72% of gun injuries occur *at home*.” Pg. 3 (Ex. D) (emphasis added). Additionally, in  
20 justifying the fee, the Memo states that “a properly stored firearm *in the home* doubles occupants’  
21 risk of becoming a victim...[and] prioritizing those investments for residents living with guns *in the*  
22 *home* will provide the most direct path for reducing gun harm.” *Id.* at 4. (emphasis added).

23 The Ordinance thus directly regulates firearms *in the home*, where the need is “most acute.”  
24 Consequently, the Ordinance burdens protected Second Amendment rights.

25 *b. If Applying a Level of Scrutiny, the Court Should Apply Strict Scrutiny*

26 The second step of the traditional test is for the court to “apply an appropriate level of  
27 scrutiny.” *Id.* “Given *Heller*’s focus on ‘core’ Second Amendment conduct and the Court’s frequent  
28 references to First Amendment doctrine, we agree with those who advocate looking to the First



1 Amendment as a guide in developing a standard of review for the Second Amendment.” *United*  
 2 *States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010). Thus, like the First Amendment, some burdens  
 3 receive strict scrutiny, such as content based speech restrictions, while others receive intermediate  
 4 scrutiny, such as time, place and manner restrictions. *Id.* The level of scrutiny “should depend on (1)  
 5 ‘how close the law comes to the core of the Second Amendment right, and (2) ‘the severity of the  
 6 law’s burden on the right.” *Chovan*, 735 F.3d at 1138 (quoting *Ezell*, 651 F.3d 703).

7 Strict scrutiny should apply because this law strikes at the very core of the Second  
 8 Amendment. It specifically targets guns in the home, “where the need for defense of self, family, and  
 9 property is most acute,” *Heller*, 554 U.S. at 628, and threatens the impoundment of guns—the  
 10 complete denial of Second Amendment rights—for noncompliance with its arbitrary insurance and  
 11 annual fee requirements.

12 The Ordinance will severely burden a gun owner’s ability to exercise his right to own a gun  
 13 for home or self-defense by imposing uncertain costs just to exercise a constitutional right. Even if  
 14 the fees are initially a low sum, the Ordinance does not cap or otherwise provide a limiting principle  
 15 for the total amount the Council may impose as a cost for owning a gun, and the cost of insurance  
 16 will be at the mercy of private insurers. This unbridled discretion that the City Council has given  
 17 itself, along with the discretion left to a private, for-profit, industry, can, and likely will, severely  
 18 burden or chill the residents of San Jose’s Second Amendment rights. It also gives the City the  
 19 ability to strategically play possum in this litigation, proffering the Ordinance imposes a lower  
 20 financial burden and citing economic hardship exceptions, despite the Ordinance not limiting the  
 21 costs they can impose tomorrow.

22 For example, if the essential purpose and mechanism of the Ordinance are ratified by the  
 23 Court, regardless of the amount of the City’s fees and the cost of the mandatory insurance and the  
 24 actual direct costs to the city, there would be nothing to prevent the City from attempting to shift the  
 25 full brunt of its bogus claim of \$442 million in societal costs in San Jose onto the estimated 55,000  
 26 gun owners, for a per-owner charge of \$8,036.36 per person—in addition to whatever insurance  
 27 companies may charge, if they cover the liabilities the City mandates they cover.

28 //



1 Accordingly, strict scrutiny is the appropriate level of scrutiny if the Court applies any level  
2 of scrutiny.

3 *c. The Ordinance Even Fails Intermediate Scrutiny*

4 This Ordinance does not satisfy the lower standard of an intermediate scrutiny analysis, let  
5 alone the strict scrutiny standard. Intermediate scrutiny requires “1) the government’s stated  
6 objective to be significant, substantial, or important; and 2) a reasonable fit between the challenged  
7 regulation and the asserted objective.” *Chovan*, 735 F.3d at 1139.

8 While neither the Supreme Court nor the Ninth Circuit have found reducing gun violence to  
9 be a compelling government interest, the Ninth Circuit has stated that it is important. *Chovan*, 735  
10 F.3d at 1139. Nevertheless, the Ordinance’s provisions are not a reasonable fit, much less narrowly  
11 tailored, to its claimed purposes. The City makes no findings, other than conclusory self-serving  
12 statements, that special gun accident insurance or compulsory donations to anti-gun nonprofits will  
13 reduce gun violence or other injuries, particularly gun violence by those who lawfully possess  
14 firearms to be kept in the home, much less the root cause of most costs cited in the Ordinance:  
15 criminals who use guns to commit intentional acts of violence. *See generally* Ordinance § 10.32.200.

16 That the Ordinance does not in fact limit how the chosen nonprofit would spend the City’s  
17 Gun Harm Reduction Fee, and specifically forbids the City from directing the spending of its own  
18 fee, renders speculative any argument that payment of the fee furthers the Ordinance’s aims. And, so  
19 far, there is no requirement that any particular gun owner (or their household members and close  
20 personal associates) subject to the Ordinance must actually receive the services for which the City’s  
21 fee is paying the nonprofit to provide.

22 Additionally, the Ordinance embodies a second government purpose of shifting the claimed  
23 collective costs of gun injuries caused by some onto nearly all gun owners. *See* Ordinance  
24 § 10.32.200.B.8, 9. The extrajudicial exaction of payments from a whole class of persons (those  
25 exercising their Second Amendment rights) to pay City or societal costs arising from the actions of a  
26 few individuals (violent criminals, including perpetrators of domestic gun violence, and careless gun  
27 owners) smacks of collective punishment. It is neither a reasonable fit with a significant, substantial,  
28

1 or important government interest, nor narrowly tailored to a compelling interest—indeed it is an  
 2 illegitimate government practice.

3 Further, the city’s costs related to police, fire, judicial expenses form a substantial part of the  
 4 City’s costs—but none of the Ordinance’s measures will compensate the city for these claimed  
 5 municipal losses. They are also *normal* government costs, shared by all, that have historically been  
 6 financed through general tax revenue, not taxes imposed selectively on particular citizens or  
 7 communities.

8 The other private costs related to loss of work and quality of life are purely manufactured and  
 9 arbitrary abstract concepts that will only be impacted by the Ordinance in equally arbitrary, abstract,  
 10 speculative, and attenuated ways. The City’s own hired research firm concluded that \$253,828,000  
 11 of the \$411,699,000 in total costs it calculated came from “Homicide/Assault/Legal Intervention”  
 12 alone. Liccardo Jan. 19 Memo 5 (Ex. I). Thus, roughly 57% of the costs incurred by the City, by its  
 13 own calculation, comes from crime alone, which neither insurance nor the fee will ever reimburse.  
 14 Indeed, the City’s research states that its “primary costs” are for “fire department and police  
 15 response.” The Gun Harm Reduction Fee going to the nonprofit is supposed to be for educational  
 16 programs, not to compensate San Jose for its losses and there is no indication in the Ordinance that  
 17 the City expects to claim any funds from the gun owners’ insurance policies.

18 Finally, the government cannot impose fees on guns for purposes other than administrative  
 19 costs. The government “may not impose a charge for the enjoyment of a right granted by the federal  
 20 constitution.” *Murdock*, 319 U.S. at 113. It may collect a fee to “meet the expense incident to the  
 21 administration of the act and to the maintenance of public order in the matter licensed.” *Cox v. New*  
 22 *Hampshire*, 312 U.S. 569 (1941). “[I]mposing fees on the exercise of constitutional rights is  
 23 permissible when the fees are designed to defray (and do not exceed) the administrative costs of  
 24 regulating the protected activity.” *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2nd Cir. 2013). The  
 25 Ninth Circuit has adopted this *Murdock/Cox* fee-jurisprudence for the Second Amendment. *Bauer v.*  
 26 *Becerra*, 858 F.3d 1216 (9th Cir. 2017). Here, the Gun Harm Reduction Fee goes directly to a  
 27 nonprofit for the purposes of reeducating gun owners. Ordinance §§ 10.32.215, 10.32.220. The  
 28

1 administrative costs of the Ordinance, if any, are actually covered by an entirely separate fee  
2 authorized by the Ordinance. *Id.* at § 10.32.250.

3 *d. Alternatively, the Ordinance is Unconstitutional Because It Burdens the Second Amendment*  
4 *Right to Keep and Bear Arms*

5 The majority opinion in *Heller* noted that “We know of no other enumerated constitutional  
6 right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.” 554  
7 U.S. at 634. This was in response to Justice Breyer’s dissent, which claimed that a law restricting  
8 guns was constitutional after weighing its burden on Second Amendment rights against handgun  
9 violence, urban geography, and history. *Id.* But the majority stated that “The very enumeration of the  
10 right takes out of the hands of government—even the Third Branch of Government—the power to  
11 decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Id.* Indeed, as  
12 Justice Kavanagh noted, while on the D.C. Circuit, “The Court’s failure to employ strict or  
13 intermediate scrutiny appears to have been quite intentional and well-considered.” *Heller v. District*  
14 *of Columbia*, 670 F.3d 1244, 1273 (D.C. Cir. 2011)(Kavanagh, B., dissenting) (quoting Tr. Of Oral  
15 Arg. at 44, *Heller*, 554 U.S. 570 (No. 07-290)) (“[T]hese various phrases under the different  
16 standards that are proposed, ‘compelling interest,’ ‘significant interest,’ ‘narrowly tailored,’ none of  
17 them appear in the Constitution...these standards that apply in the First Amendment just kind of  
18 developed over the years as sort of baggage that the First Amendment picked up.”). Thus, a  
19 balancing tests that weighs a government interest against a constitutional right under a strict scrutiny  
20 or intermediate scrutiny analysis is inappropriate under *Heller*.

21 The Ordinance is therefore unconstitutional based on the mere fact that its insurance  
22 requirement and fees burden Plaintiffs’ ability to exercise their Second Amendment rights.

23 **2. The Ordinance Violates Plaintiffs’ Free Speech and Association Rights.**

24 To continue to exercise their Second Amendment rights, the Ordinance unconstitutionally  
25 forces gun owners to associate with and subsidize the speech of others with whom they may  
26 disagree.

27 “[M]andatory associations are permissible only when they serve a compelling state interest  
28 that cannot be achieved through means significantly less restrictive of associational freedoms.” *Knox*

1 v. *SEIU*, 567 U.S. 298, 310 (2012). “Compelling a person to subsidize the speech of other private  
 2 speakers raises similar First Amendment concerns.” *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448,  
 3 2464 (2018)(citing *Knox*, 567 U.S. at 309). “As Jefferson famously put it, ‘to compel a man to  
 4 furnish contributions of money for the propagation of opinions which he disbelieves and abor[s] is  
 5 sinful and tyrannical.” *Id.* (quoting A Bill for Establishing Religious Freedom, in 2 papers of  
 6 Thomas Jefferson 545 (J. Boyd ed. 1950)). “Because the compelled subsidization of private speech  
 7 seriously impinges on First Amendment rights, it cannot be casually allowed.” *Id.* Thus, in *Janus*,  
 8 the Supreme Court concluded that a law that requires government agencies to extract “agency fees”  
 9 from “nonconsenting employees,” violates the First Amendment. *Id.* at 2486.

10 The operation of the Ordinance is strikingly similar to the imposition of mandatory union  
 11 “agency fees” on public sector employees, addressed by the Supreme Court in *Janus*. In *Janus*, an  
 12 employee, whether or not he/she wanted to associate with the union, was required to pay an “agency  
 13 fee” to the union. *Janus*, 138 S.Ct. at 2460. Here, whether a gun owner wants to associate with or  
 14 donate to the nonprofit or not, he/she must pay the Gun Harm Reduction Fee directly to the City’s  
 15 chosen nonprofit. Ordinance § 10.32.215. In *Janus*, no form of employee consent was required by  
 16 the state’s statute. *Janus*, 138 S.Ct. at 2486. Likewise, the Ordinance does not have any consent  
 17 provision. *See generally* Ordinance. Such a procedure “violates the First Amendment.” *Janus*, 138  
 18 S.Ct. at 2486.

19 In another illustrative case, the Supreme Court held that the California Bar could use  
 20 members’ dues to “fund activities germane” to the “State’s interest in regulating the legal  
 21 profession” but it could not use members’ dues to “fund activities of an ideological nature which  
 22 falls outside of those areas of activity.” *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990). So  
 23 likewise, the City of San Jose cannot force gun owners to pay fees to a nonprofit for whatever  
 24 purposes they desire, particularly to discourage exercising the right to keep and bear arms.  
 25 It is a well-established principle that:

26 [T]he right of freedom of thought protected by the First Amendment against state  
 27 action includes both the right to speak freely and the right to refrain from speaking at  
 28 all. A system which secures the right to proselytize religious, political, and  
 ideological causes must also guarantee the concomitant right to decline to foster such

1 concepts. The right to speak and the right to refrain from speaking are complementary  
2 components of the broader concept of individual freedom of mind.

3 *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citations and internal quotations  
4 omitted).

5 In recent comments, Mayor Liccardo has likened the compulsory payment of the Gun Harm  
6 Reduction Fee to forced membership in a club. After describing the nonprofit's activities the gun  
7 owner's payment of the annual fee to the nonprofit would fund, a reporter asked the mayor if "it's  
8 almost like joining a club," to which the Mayor responded:

9 Yeah, and look, I don't pretend to believe these are overwhelmingly folks who are  
10 willing to want to do this. I recognize that this is by government fiat, and many would  
11 prefer not to pay the fee.

12 Mary Harris, *San Jose's New Gun Law Is the First of Its Kind*, Slate.com, [https://slate.com/news-](https://slate.com/news-and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html)  
13 [and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html](https://slate.com/news-and-politics/2022/02/san-jose-gun-law-mayor-sam-liccardo-interview.html).

14 Here, the forced association and subsidization of speech is more severe even than in *Janus*.  
15 In *Janus*, the employees' union fees were a condition of employment. While conditioning  
16 employment on forgoing constitutional rights is significant, here, the Ordinance conditions a  
17 constitutional right on forgoing other constitutional rights.

18 Indeed, "government may not deny a benefit to a person because he exercises a constitutional  
19 right." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983). Here, the  
20 Ordinance denies citizens a benefit (freedom of speech and association) by forcing them to associate  
21 with and subsidize a nonprofit that will communicate messages which gun owners will not agree  
22 with solely because the citizens exercise their constitutional right to own a gun. The Gun Harm  
23 Reduction Fee therefore violates the First Amendment.

24 As stated above, in *Heller*, Justice Roberts noted that interest-balancing tests for the First  
25 Amendment are "baggage." Tr. of Oral Arg. At 44, *Heller*, 554 U.S. 570 (No. 07-290). Currently,  
26 the Supreme Court has not assigned a test for compelled subsidization of speech. *See Janus*, 138  
27 S.Ct. at 2465 ("[W]e again find it unnecessary to decide the issue of strict scrutiny because the  
28 Illinois scheme cannot survive under even the more permissive standard...."). The Court did say,

1 however, that “minimal scrutiny is foreign to our free-speech jurisprudence.” *Id.* As Justices Scalia  
 2 and Roberts have noted in *Heller*, the Constitution does not prescribe a balancing test, so there  
 3 should not be one. However, if such a test is administered, for the reasons stated above, this  
 4 Ordinance cannot pass even intermediate scrutiny; therefore, the Ordinance should be enjoined for  
 5 violating the First Amendment.

### 6 **3. The Ordinance Violates article XI, § 7 of the California Constitution.**

7 Article XI, section 7 of the California Constitution states that “A county or city may make  
 8 and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in  
 9 conflict with general laws.” This provision prohibits a local law that “duplicates, contradicts, or  
 10 *enters an area fully occupied by general law*, either expressly or by legislative implication.” *Fiscal*  
 11 *v. City and County of San Francisco* 158 Cal.App.4th 895, 903 (Cal. Ct. App. 2008)(quotation  
 12 omitted)(emphasis added).

13 The State of California has voluminous statutes comprehensively regulating firearm  
 14 ownership in California. *See generally* Cal. Penal Code §§ 23500-34370. This includes firearm  
 15 safety, CAL. PENAL CODE §§ 23500-23520, the appearance of firearms, *id.*, §§ 23800-24790, storage  
 16 of firearms, *id.*, §§ 25000-25225, how to handle lost or stolen firearms, *id.*, §§ 25250-25225,  
 17 carrying firearms, *id.*, §§ 25300-26406, the sale, lease, or transfer of firearms, *id.*, §§ 26500-28490,  
 18 the registration and assignment of firearms, *id.*, §§ 28010-28024, how to transfer firearms between  
 19 private persons, *id.*, §§ 28050-28070, recordkeeping, background checks, and fees related to transfer,  
 20 *id.*, §§ 28100-28490, the manufacture of firearms, *id.*, §§ 29010-29184, who may not possess a  
 21 firearm, *id.*, §§ 29610-30165, rules pertaining to “firearm equipment,” *id.*, §§ 30150-30165, and, in  
 22 some cases, firearm registration, *id.*, §§ 30900-30965. This is but a sample of all of the separate  
 23 statutes regulating firearms in California.

24 California courts have already determined that “the Legislature intended to occupy the field  
 25 of residential handgun possession to the exclusion of local government entities.” *Fiscal*, 158  
 26 Cal.App.4th at 909 (citing Cal. Penal Code § 12026).<sup>1</sup> Thus, the Ordinance, insofar as it intends to  
 27

28 <sup>1</sup> The specific mandates in the state laws cited in *Fiscal* have since been transferred into other statutes with no substantive change.

1 impose gun storage and safety requirements, plainly encroaches upon a field already occupied by  
2 state law, and thus violates Article XI, section 7.

3 **4. The Ordinance Violates Article XIII C, Section 1 of the California Constitution.**

4 The California Constitution requires that “No local government may impose, extend, or  
5 increase any *general tax* unless and until that tax is submitted to the electorate and approved by a  
6 majority vote.” Article XIII C, §2(b) (emphasis added). It also requires that “No local government  
7 may impose, extend, or increase any *special tax* unless and until that tax is submitted to the  
8 electorate and approved by a two-thirds vote.” Article XIII C, §2(d) (emphasis added). A “tax” is  
9 “any levy, charge, or exaction of any kind imposed by a local government,” with exceptions that do  
10 not apply here. Article XIII C, §1(e). The Gun Harm Reduction Fee and the insurance requirement  
11 (backed by the threat of a fine payable to the City) are levies, charges or exactions imposed by the  
12 City of San Jose and thus each constitutes a “tax” within the meaning of the California Constitution.  
13 *Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564-566 (2012) (a law describing a payment  
14 as a “penalty” for not complying with an insurance requirement does not determine whether the  
15 payment is a tax for constitutional purposes).

16 If the City disputes that the Gun Harm Reduction Fee or insurance requirement is a tax, “the  
17 [City] bears the burden of proving by a preponderance of the evidence that a levy, charge, or other  
18 exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the  
19 governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or  
20 reasonable relationship to the payor’s burdens on, or benefits received from, the governmental  
21 activity.” Article XIII C, §1.

22 The City cannot meet this burden. The amount of the Gun Harm Reduction Fee and the  
23 required insurance payments (including penalties for noncompliance) are “more than necessary to  
24 cover the reasonable costs of the governmental activity” because neither is for government activity.  
25 Additionally, as to both the Gun Harm Reduction Fee and the mandatory insurance, “the manner in  
26 which those costs are allocated to” gun owners do not “bear a fair or reasonable relationship to the  
27 payor’s burdens on, or benefits received from” the City’s “governmental activity.” Article XIII C,  
28 §1. Every gun owner would be compelled by the Ordinance to pay an arbitrary amount for the Gun



1 Harm Reduction Fee and pay the city a fine if they do not have an insurance policy specifically  
 2 covering them for owning a gun. The Ordinance does not establish, or claim, that each gun owner  
 3 will receive a benefit in return for the fee paid having a value commensurate with the amount they  
 4 paid. For the same reasons stated in the Second Amendment analysis regarding reasonable fit,  
 5 neither the insurance requirement nor the Gun Harm Reduction Fee bear a fair or reasonable  
 6 relationship to the payor's burdens on, or benefits received from, a governmental activity.

7 The Ordinance's required payments, whether general or special taxes, were never voted  
 8 upon by the citizens of San Jose. Compl. First Am. Compl. ¶ 72. Accordingly, they violate the  
 9 California Constitution.

10 **5. The Ordinance Violates the San Jose's City Charter's Reservation of Budget**  
 11 **and Appropriation Powers to the City Council and Administrative Powers to**  
 12 **the City Manager.**

13 The Ordinance violates the San Jose City Charter by commanding gun owners to directly pay  
 14 the City's Gun Harm Reduction Fee to one nonprofit to be used for program activity that was not  
 15 directed by the City Council or managed by the City Manager.

16 The San Jose City Charter vests in the City Council "[a]ll powers of the City and the  
 17 determination of all matters of policy." San Jose City Charter § 400. With regard to the expenditure  
 18 of City funds, only the City Council has the power to establish a budget. *Id.* §§ 1204, 1206. The  
 19 Council also has the sole power to appropriate the expenditure of City funds. *Id.*, § 1207. The City  
 20 Manager, by contrast, is the "Chief Administrative Officer and head of the administrative branch of  
 21 the City government." *Id.*, § 502; *see also id.*, § 701.

22 The Ordinance, by prohibiting the City Council from using its budgeting and appropriating  
 23 powers to direct how the receipts from the City's Gun Harm Reduction fee are expended by the  
 24 chosen nonprofit, Ordinance § 10.32.220.C, violates the San Jose City Charter's reservation of  
 25 budgeting and appropriation power to the City Council. The Ordinance also violates the City  
 26 Charter's delegation of executive functions to the "administrative" branch of the City Government  
 27 under the leadership and control of the City Manager because the Ordinance says "the City shall not  
 28 specifically direct how the monies from the Gun Harm Reduction Fee are expended" other than a



1 vague direction to “reduce the risk” of harm from using firearms and “mitigate the risk” of harm or  
2 liability from possessing firearms. *Id.*

3 **6. The Ordinance Violates the San Jose City Charter’s Requirement that City**  
4 **Receipts Be Deposited into City Accounts.**

5 The San Jose City Charter states that “[a]ll revenues and receipts which are not required by  
6 [the] Charter, State law or ordinances to be placed in special funds shall be credited to the [City’s]  
7 General Fund.” *Id.*, § 1211. The General Fund is “a medium of control and accounting for all City  
8 activities excepting activities for which special funds are established and maintained.” *Id.*

9 The Ordinance requires gun owners to pay the City-required, City-determined fee directly to  
10 a nonprofit organization, *id.*, § 10.32.215, thereby diverting a City fee to a nonprofit rather than the  
11 City’s General Fund or a special fund. This violates the City Charter’s requirement that all City  
12 revenues and receipts be deposited into City accounts. The loss of this essential means of City  
13 “control and accounting,” in combination with the Ordinance’s prohibition against City control of  
14 the nonprofit’s use of the funds and the vague statements about what the nonprofits should use the  
15 funds for, is an open invitation to corruption, waste, fraud, and abuse.

16 **B. Plaintiffs Face Imminent Irreparable Harm Absent Immediate Injunctive Relief.**

17 For a statute that violates the Second Amendment, the “remedy is necessarily directed at the  
18 statute itself and *must* be injunctive and declaratory.” *Ezell*, 651 F.3d at 698. (emphasis in original).  
19 A city ordinance that violates the Second Amendment “stands as a fixed harm to every [citizen’s]  
20 Second Amendment right.” *Id.* “Irreparable harm is presumed” and cannot be remedied by damages.  
21 *Id.* at 699.

22 Additionally, “where the First Amendment is implicated, the Supreme Court has made clear  
23 that ‘[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably  
24 constitutes irreparable injury’ for purposes of the issuance of a preliminary injunction.” *College*  
25 *Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1011 (N.D. Cal. 2007)  
26 (citing *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir. 2002), in turn citing *Elrod*  
27 *v. Burns*, 427 U.S. 347, 373 (1976)); see also *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1148  
28 (9th Cir. 1998) (holding that a civil liberties organization that had demonstrated probable success on

1 the merits of its First Amendment overbreadth claim had thereby also demonstrated irreparable  
 2 harm). “In other words, the requirement that a party who is seeking a preliminary injunction show  
 3 ‘irreparable injury’ is deemed fully satisfied if the party shows that, without the injunction, First  
 4 Amendment freedoms would be lost, even for a short period.” *Reed*, 523 F. Supp. 2d at 1011.  
 5 “Unlike a monetary injury, violations of the First Amendment ‘cannot be adequately remedied  
 6 through damages.’” *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049, 1058  
 7 (C.D. Cal. 2016) (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)).

8 Without an injunction preventing Defendants from enforcing the Ordinance, Plaintiffs will  
 9 suffer irreparable harm in the form of deprivation of fundamental freedoms secured by the First,  
 10 Second and Fourteenth Amendment to the U.S. Constitution and the California Constitution.  
 11 Plaintiffs’ irreparable injuries cannot adequately be compensated by damages or any other remedy  
 12 available at law. Thus, irreparable injury is clearly shown, necessitating the relief Plaintiffs seek in  
 13 this Motion.

14 **C. The Balance of Hardships Tips Decidedly in Plaintiffs’ Favor.**

15 “[S]erious First Amendment questions compel[] a finding that there exists the potential for  
 16 irreparable injury, or that at the very least the balance of hardships tips sharply in [the plaintiffs’]  
 17 favor.” *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (quoting  
 18 *Sammartano*, 303 F.3d at 973). Similarly, when there is a threat of sanctions for failure to act on a  
 19 law that restricts Second Amendment rights, even if the government endures hardship, the balance  
 20 favors the plaintiffs. *See Duncan v. Becerra*, 265 F.Supp.3d 1106, 1136 (S.D. Cal. 2017).

21 Here, if the Ordinance goes into effect and is enforced, tens of thousands of San Jose citizens  
 22 will risk seizure of their guns and the payment of fines if they do not forgo their fundamental rights  
 23 to keep arms and to free speech and association, as well as rights under the California constitution to  
 24 vote on tax increases, and rights under the City Charter to have City fees deposited into City  
 25 accounts. The balance of hardships sharply tips in favor of Plaintiffs.

26 **D. Injunctive Relief Is in The Public Interest**

27 “As the Ninth Circuit has consistently recognized, there is a significant public interest in  
 28 upholding First Amendment principles.” *Americans for Prosperity Foundation*, 182 F. Supp. 3d at

1059 (internal citations omitted); *see also Doe v. Harris*, 772 F.3d 563, 683 (9th Cir.2014);  
*Sammartano*, 303 F.3d at 974. Similarly, “the public interest favors the exercise of Second  
 Amendment rights by law-abiding responsible citizens.” *Duncan*, 265 F.Supp.3d 1106.

As discussed above, Plaintiffs’ core constitutional rights to own guns to defend one’s home  
 and self will remain in jeopardy so long as Defendants remain free to enforce their Ordinance.  
 Likewise, Plaintiffs’ right to free speech and association will be jeopardized by forcing them to  
 subsidize and associate with a nonprofit. Holding the City Council to account for the constraints on  
 its power in the California constitution and the City Charter are also in the public interest.  
 Accordingly, issuance of injunctive relief is proper, and the Court should grant this Motion.

## 10 **II. THE COURT SHOULD DISPENSE WITH ANY BOND REQUIREMENT**

Rule 65(c) of the Federal Rules of Civil Procedure provides that a preliminary injunction  
 may be issued “only if the movant gives security in an amount that the court considers proper to pay  
 the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”  
 Fed. R. Civ. P. 65(c). However, the Court has discretion as to whether any security is required and, if  
 so, the amount thereof. *See, e.g., Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003).

Plaintiffs request that the Court waive any bond requirement, because enjoining Defendants  
 from unconstitutionally enforcing the Ordinance will not financially affect Defendants, who do not  
 have a financial stake in enforcing the Ordinance. A bond would, however, be burdensome on  
 already burdened Plaintiffs under these circumstances. *See, e.g., Bible Club v. Placentia-Yorba  
 Linda School Dist.*, 573 F. Supp. 2d 1291, fn. 6 (C.D. Cal. 2008) (waiving requirement of student  
 group to post a bond where case involved “the probable violation of [the club’s] First Amendment  
 rights” and minimal damages to the District of issuing injunction)(citing *Doctor John’s, Inc. v. Sioux  
 City*, 305 F. Supp. 2d 1022, 1043-44 (N.D. Iowa 2004) (“requiring a bond to issue before enjoining  
 potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because  
 the rights potentially impinged by the governmental entity’s actions are of such gravity that  
 protection of those rights should not be contingent upon an ability to pay.”)).

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**CONCLUSION**

Plaintiffs respectfully request that the Court grant Plaintiffs' motion for a preliminary injunction to restrain and enjoin Defendants, as well as their agents, employees, and successors in office, from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any provision of the Ordinance.

Respectfully submitted,

Date: March 8, 2022

DHILLON LAW GROUP INC.

By: /s/ Harmeet K. Dhillon

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**CERTIFICATE OF SERVICE**

I, Harmeet K. Dhillon, hereby certify that on March 8, 2022, I electronically filed the above document with the Clerk of the Court using CM/ECF, which will send electronic notification of such filing to all registered counsel.

Dated: March 8, 2022

By: /s/Harmeet K. Dhillon  
Harmeet K. Dhillon